TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 264

ST. LOUIS–SAN FRANCISCO RAILWAY COMPANY,
PETITIONER,

vs.

ODELL MILLS, AS ADMINISTRATRIX OF THE ESTATE OF
IRA S. MILLS, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1925

CERTIORARI GRANTED MARCH 9, 1925

(30,841)

(30,841)

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[fols. 1 & 2] [Caption omitted]

[fol. 3] **IN CIRCUIT COURT OF JEFFERSON COUNTY**

SUMMONS

THE STATE OF ALABAMA,
Jefferson County:

Circuit Court

No. 25130

To any Sheriff of the State of Alabama, Greeting:

You are hereby commanded to summons St. Louis and San Francisco Railroad Company, a corporation, to appear before Circuit Court, to be held for said County, at the place of holding the same, within thirty days from service of this process, then and there to answer the complaint of Odell Mills, as Administratrix of the estate of Ira S. Mills, deceased.

Witness my hand, this 31 day of Aug. 1922.

Wm. J. Waldrop, clerk.

IN CIRCUIT COURT OF JEFFERSON COUNTY

COMPLAINT—Filed Aug. 31, 1922

ODELL MILLS, as Administratrix of the Estate of Ira S. Mills, Deceased, Plaintiff,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant

Plaintiff claims of defendant $50,000 as damages, for that heretofore, to-wit, on the 3rd day of August, 1922, plaintiff's intestate, Ira S. Mills, was employed by defendant in commerce between the [fol. 4] State of Alabama and another state or states, or territory of the United States of America, and while defendant was engaged in such commerce between said State of Alabama and said other state or states, or territory, and the said intestate was so employed by defendant in said commerce, he suffered personal injury, as a proximate consequence of which he died, and before his death suffered great mental and physical pain and anguish, and at his death left surviving him his widow, viz: the said Odell Mills, and children.

Plaintiff avers that said injury to said intestate and the said death resulted wholly or in part from the negligence of the officers, agents, or employes of defendant, for all of which plaintiff sues for the benefit of herself, as the widow, and of the said children of intestate, under an Act of the Congress of the United States, known as Federal Employer's Liability Act, of 1908, as amended.

Harsh, Harsh & Harsh, Attorneys for Plaintiff.

Plaintiff demands a trial by jury of the above styled cause.

Harsh, Harsh & Harsh, Attorneys for Plaintiff.

[File endorsement omitted.]

Sheriff's Return

Executed this the 25th day of September, 1922, on St. Louis-San Francisco Railroad Company, a corporation, by leaving a copy of within with C. J. Snook, agent of said Company.

J. C. Hartsfield, Sheriff, by J. E. Matlock, D. S.

[fol. 5] In Circuit Court of Jefferson County

[Title omitted]

Notice of Petition for Removal

To Harsh, Harsh & Harsh, Attorneys of Record for Plaintiff:

Take notice that the defendant will, on the 27th day of September, 1922, at 9 o'clock A. M., or as soon thereafter as counsel can be heard, move the Honorable Dan A. Greene, Judge of the Circuit Court of Jefferson County, Alabama, or if he be not available, some other Judge of the said Circuit Court, for an order removing this cause to the District Court of the United States for the Southern Division of the Northern District of Alabama, in accordance with the petition and bond of defendant, copies of which are hereto attached and served upon you.

Done this 25th day of September, 1922.

Cabaniss, Johnston, Cocke & Cabaniss, Attorneys for Defendant.

We hereby accept service of the above notice, together with receipt of a true copy of the same and of true copies of the petition and bond of the defendant referred to in said notice.

Harsh, Harsh & Harsh, Attorneys for Plaintiff.

[fol. 6] IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

PETITION FOR REMOVAL

To the Honorable the Judges of the Circuit Court of Jefferson County, Alabama:

The petition of St. Louis-San Francisco Railway Company, the defendant in this cause, respectfully shows that this suit was instituted against this defendant in the Circuit Court of Jefferson County, Alabama, on the 31st day of August, 1922, and that the summons and complaint in said action was served upon defendant on, to-wit the 2nd day of September, 1922; that this defendant is the sole defendant in said cause, and that the time for appearing and pleading in said action under the statutes of Alabama and the rules and practice of this court has not expired; that at the time said suit was begun, and at the present time, the plaintiff was and still is, a citizen and resident of the State of Alabama, and that the defendant was at all such times, and still is, a corporation organized and existing under and by virtue of the laws of the State of Missouri, having its chief office and place of business in St. Louis, in said State, and is as such, a citizen and resident of the State of Missouri, within the meaning of the Acts of Congress relating to the removal of causes; [fol. 7] that the amount in controversy in said suit exceeds the sum of three thousand dollars ($3,000.00), exclusive of interests and costs, and that this is a suit wholly between citizens of different states, with- the meaning of the Acts of Congress relating to the removal of causes.

The defendant herewith files its bond with good and sufficient surety for its entering into the District Court of the United States for the Southern Division of the Northern District of Alabama, within thirty days from the filing of this petition, a certified copy of the record in said suit and for the payment of all costs that may be awarded by the said District Court if said court shall hold that such suit was wrongfully or improperly removed thereto.

Wherefore defendant prays this Honorable Court that this petition and bond may be accepted and approved, and said suit removed into the District Court of the United States for the Southern Division of the Northern District of Alabama, and that this court proceed no further in the premises.

St. Louis-San Francisco Railway Company, by Cabaniss, Johnston, Cocke & Cabaniss, Its Attorneys.

Sworn to by W. R. C. Cocke. Jurat omitted in printing.

[fols. 8 & 9] BOND ON REMOVAL FOR $500—Approved and filed September 27, 1922; omitted in printing

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[fol. 10] IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

ORDER FOR REMOVAL—Filed Sept. 27, 1922

The defendant herein having within the time provided by law, filed its petition for removal of this cause to the District Court of the United States, for the Southern Division of the Northern District of Alabama, and having at the same time offered its bond in the sum of Five Hundred Dollars ($500.00) with good and sufficient surety, pursuant to statute and conditioned according to law.

Now, therefore, this Court does hereby accept and approve said bond and accept said petition, and does order that this cause be removed for trial to the District Court of the United States for the Southern Division of the Northern District of Alabama, pursuant to the statutes of the United States, and that all further proceedings in this court be stayed in this cause; and the Clerk of this Court is hereby ordered and directed to make a copy or transcript of the record in said cause, for transmission to the said District Court of the United States.

Done this 27th day of September, 1922.

Dan A. Greene, Circuit Judge.

[File endorsement omitted.]

[fol. 11] IN CIRCUIT COURT OF JEFFERSON COUNTY

CLERK'S CERTIFICATE

I, William J. Waldrop, Clerk of the Circuit Court for the Tenth Judicial Circuit of Alabama, do hereby certify that the foregoing pages numbered from one (1) to seven (7) both inclusive contain a full, true and correct transcript of the Summons and Complaint, Sheriff's Return, Notice, Petition, Affidavit, Bond and Order for Removal in the case of Odell Mills, as Administratrix of the estate of Ira S. Mills, deceased, Plaintiff versus St. Louis-San Francisco Railroad Company, a corporation, Defendant.

I further certify that the costs that have accrued in the above case up to the present date amounts to the sum of $13.60.

All of which appears of record in this court and all of which I certify to the District Court of the United States for the Southern Division of the Northern District of Alabama.

Witness my hand and seal of this court, on this the 28th day of September, 1922.

Wm. J. Waldrop, Clerk Circuit Court for the Tenth Judicial Circuit of Alabama. (Seal.)

[fol. 12] IN UNITED STATES DISTRICT COURT, SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

No. 2838.

ODELL MILLS, as Administratrix of the Estate of Ira S. Mills, Deceased, Plaintiff,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant

AMENDMENT TO COMPLAINT—Filed Feb. 26, 1924

Comes plaintiff and by leave of the court amends her summons and complaint in the above styled cause in the following particulars, viz.,

1. By correcting the name of defendant corporation wherever it occurs in said summons and complaint so that same will read "St. Louis-San Francisco Railway Company" instead of as it now appears.

2. Plaintiff strikes the word "children" wherever it occurs in said complaint and in lieu thereof inserts the word "child."

3. Plaintiff adds at the end of the first count of her complaint immediately before the signature thereto, the following, viz., Plaintiff further avers that at the time of the said injury and death of plaintiff's said intestate this defendant was engaged in the business of a common carrier in interstate commerce and that the said intestate at said time was employed by said defendant in such interstate commerce and was engaged in or about performing duties for the defendant in the line and scope of his said employment by defendant. Plaintiff further avers that plaintiff's said intestate left [fol. 13] surviving him his widow, Odell Mills, and one minor child, viz., Kermit Mills, of the age of to-wit: three years, both of whom were dependent upon said intestate for support and are entitled to the benefits of any recovery on account of his death under the Federal Employer's Liability Act.

Plaintiff further avers that the said injuries and death of plaintiff's said intestate resulted either wholly or in part from the negligence of an officer, agent or employee of defendant, acting within the line and scope of his employment or authority by defendant and said death of plaintiff's said intestate was due to the negligence of said officer, agent or employee of defendant while acting within the line and scope of his employment or authority, as aforesaid.

Harsh, Harsh & Harsh, Attorneys for Plaintiff.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER—Filed October 4, 1922

And now comes St. Louis-San Francisco Railway Company, a corporation, defendant in the above-styled cause, by counsel, and demurs to the complaint herein upon the following special grounds:

(1) Said complaint states no cause of action against this defendant.

(2) It does not appear from the averments of said complaint that this defendant violated any duty that it owed plaintiff's intestate in the premises.

(3) Said complaint states no cause of action against this defendant either at common law or under the Federal Employers' Liability Act.

(4) Said complaint fails to state a cause of action against this defendant under the Federal Employers' Liability Act, in that said [fol. 15] complaint fails to aver or show that at the time of the injury and death of plaintiff's intestate this defendant was engaged in the business of a common carrier in interstate commerce and that the said intestate at the time of his said injury and death was employed by this defendant in such commerce.

(5) It does not appear from the averments of said complaint that at the time of his alleged injury and death plaintiff's intestate was performing duties for the defendant within the line and scope of his employment by defendant.

(6) It does not appear from the averments of said complaint that plaintiff's intestate left surviving him, any persons dependent upon him for support, and entitled to the benefits of any recovery under the Federal Employers' Liability Act.

(7) It does not appear from the averments of said complaint that the injury and death of plaintiff's intestate resulted either wholly or in part, from the negligence of any officer, agent or employee of defendant acting within the line and scope of their employment or authority by defendant.

(8) It does not appear from the averments of said complaint that the alleged injury and death of plaintiff's intestate was due to the negligence of any person for whose acts or omissions this defendant would be liable or responsible.

Cabaniss, Johnston, Cocke & Cabaniss, Attorneys for Defendant.

[fol. 16] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—February 26, 1924

The District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to adjournment; Present, Honorable W. I. Grubb, United State District Judge, Northern District of Alabama, presiding; Honorable Charles B. Kennamer, United States Attorney; Thos. J. Kennamer, United States Marshal, and Chas. J. Allison, Clerk.

This cause coming on to be heard, this day, come the parties herein by counsel and in person, and plaintiff by leave of the court first had and obtained amends complaint, by separate paper this day filed, by adding Kermit Mills, 3 years old, a beneficiary under the Federal Employer's Liability Act;

Thereupon issue being joined on plaintiff's complaint as amended and defendant's plea of general issue pleaded in short by consent, with leave to give in evidence any matter which if well pleaded, would be admissible in defense of action, to have effect as if so pleaded and with leave to the plaintiff to give in evidence any matter, which if well pleaded, would be admissible in reply to such defensive matter, to have effect as if so pleaded, to try this cause comes a jury of good and lawful men, to-wit, Robert Adams and eleven others duly empanelled, tried and sworn and the trial of this cause is begun.

[fol. 17] During the introduction of the evidence, the daily hour of adjournment having arrived, it is ordered by the court that this cause be continued until tomorrow morning nine o'clock.

IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—February 27, 1924

This being the day and hour to which this cause was on yesterday continued, come again the parties herein by counsel and in person, comes also the jury heretofore selected, empanelled, tried and sworn and the trial of this cause is resumed.

After the introduction of the evidence, the argument of counsel, the oral charge delivered by the court, the jury returned in open court, the following verdict, which was read by the clerk, to-wit: "We the jury find for the plaintiff and assess her damages at the sum of $13,750.00; $8,750.00 to go to Odell Mills and $5,000.00 to Kermit Mills. Rob Adams, Foreman."

JUDGMENT

Thereupon it is ordered, adjudged and decreed by the court that said plaintiffs, Odell Mills have and recover of and from the defendant the sum of Eight Thousand, Seven Hundred and Fifty Dollars ($8,750.00), and that Kermit Mills have and recover of and from the defendant the sum of Five Thousand Dollars ($5,000.00) making a total sum of Thirteen Thousand Seven Hundred and Fifty Dollars ($13,750.00) together with all costs herein accrured, for which judgment and costs an execution may issue.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions—Filed May 19, 1924

CAPTION

Be it remembered, that upon the trial of the above styled cause before the Honorable W. I. Grubb, Judge of the District Court of the United States for the Southern Division of the Northern District of Alabama, and a jury, on the 26th day of Febraury, 1924, the following proceedings not otherwise appearing of record, were had, towit:

J. H. STEPNEY, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name is J. H. Stepney. On the night of August 3rd, 1922, when Mr. Mills was killed, I was on the street car. Before Mr. Mills was killed I saw three men get on the same car—I don't know the different stations now on that line, but one man got on [fol. 19] at the I. C crossing, and I think he was a railroad man, I don't know, he had a lantern in his hand; and the next two men got on at the next station—I don't know what station it was. And when the car run in the switch, making up near the colored playground, when it threw the reflection on this station I saw two men and a woman standing there. The car hadn't reached there; it was at the switch; that was the first station it stopped at after that. There were two white men and a colored woman. These men stopped on the back platform and rode there. When the car left this station the conductor went back there and collected, and when he collected he came back to the front platform; and the next station I was going to get off—I think it is called McClure's Station right there by the cemetery—and when I rang for the car to stop there, just before it came to a standstill the shooting commenced. The shooting came from the rear platform. I don't

know what became of Mr. Mills; I didn't know anybody personally—any of the white people personally. I learned afterwards, but not on that night, that it was Mr. Mills that was killed there. I don't know how many shots were fired.

Cross-examination:

The colored people sat in the front part of this car; we were toward the front, and I had my back toward the back platform the way we were sitting. I am not positive whether it was two or three men that got on and stood on the back platform, but I know it was as many as two. I got on the car at Thirty-seventh Street, Ensley, or Fairfield, or whatever you might call it. As far as I know, these men stayed on the back platform all the time, and never came into the car until the shooting started. I don't know whether they came into the car at any time during the shooting, [fol. 20] because I was afraid to look around. When the shooting started I tried to get out, but I couldn't. You ask the question, "You didn't turn around?" I answer, Yes sir. I just looked once and saw the flash from the pistol. I was inside the car; I never had left my seat. The flash came from the back platform; all the shots seemed to be made at the same time. I heard no threats or anything going on before the shooting indicating that any trouble was brewing; I didn't hear any words at all. I was in the colored compartment of the car.

By the Court:

Q. Were there two people at the station—you say there were two white men, you say, that got on the back platform?
A. Yes, sir.

By Mr. Harsh:

Q. Were the two white men, were they with the colored woman, or were they separate from her?
A. The colored woman was standing at this end of the station, and the white people were at the other end. The woman was standing with her back to the porch, with her back up to the cement of the porch.

It was agreed between the parties that when the word Frisco is used it is to be taken to mean the defendant company.

L. L. Jenkins, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name is L. L. Jenkins. On the 3rd day of August, 1922, the night that Mr. Ira S. Mills was killed, I was a guard for the St. Louis-San Francisco Railway Company; I was on day duty at

that time. I had known Mr. Mills from Monday of that week, until he was killed, Thursday night, I think it was. He roomed next [fol. 21] door to my house, and worked for the Frisco at East Thomas Yards. When I say Frisco, I mean St. Louis-San Francisco Railway Company. His job was car inspector. I guarded him lots of times while he was engaged in doing it. Well, that was his regular job. I saw him that afternoon; he came on at three, then I had charge of guarding him until seven when I went off duty. From that time until seven o'clock when I went off duty that night he was inspecting trains—freights. Mr. Mills was on duty from three till eleven p. m. We made up one train just before I left there, that was scheduled to go to Mississippi. Well, that was the orders. He inspected that train. I left him just as he went through the train. That was a St. Louis-San Francisco Railway Company train. I went home. At the time he was killed, Mr. Mills had been in the employ of the St. Louis-San Francisco Railway Company about three days, I think. I do not know what his wages were; I do not know what the wages of a car inspector were at that time. He was inspecting trains in the East Thomas yards, in Birmingham, Ala. He was rooming at 810 North Eighteenth Street, in Birmingham. I was an employee of the defendant company and was employed to take care of these men. There was a strike of the former employees of the Frisco in progress at the time, and I was employed as a guard.

At this point counsel for the plaintiff asked the witness the following question:

"Q. About how many men were there on strike at that time, if you have any idea; were there considerable or few?"

The defendant objected to the question upon the ground that it [fol. 22] had no bearing upon any issue in the case. The Court overruled the objection and the defendant in open court duly and legally excepted, and the witness answered:

"A. It seems to be there was good many; all that had been there was on a strike." I declare I don't know how many worked there; a considerable number of men. There had been threats of violence to the men who were working, like Mr. Mills, but not to me. I heard them making the threats one evening as I was bringing a crowd of men out; I heard the threats as to what they were going to do, but they were not talking directly to me, though. Well, there was about eight or ten men standing at the end of the yard on the Acipco car line when I brought out the workmen, bringing them home; and there was some of the men in the crowd made the remark that, "Here is some one that I'm going to get," and I just went on through the crowd and pushed on through, and would not let them even stop at all. The men making these threats were strikers. That is the only time I ever saw the crowd out there when I brought them out.

At this point counsel for the plaintiff asked the witness the following question:

"Q. Well, did you report that—to the Company?"

The defendant objected to the question upon the ground that it had no bearing upon any issue in the case. The Court overruled the objection, the defendant in open court duly and legally excepted, and the witness answered:

I reported that to my superior officers of the Company. That was [fol. 23] about a week or ten days before the night Mr. Mills was killed. I reported it to Mr. George Tyler. He was supposed to be the sergeant over the police.

He was in charge of the Company guards; yes, sir. Mr. Mills came to my house about 12:15 the same night he was shot, after he was shot, and I saw his wounds. Why, he had five bullet holes in him; there was one in each arm, and one in the stomach, and one hit him in the back and came through and the ball lodged right under here (indicating), and there was one went through the thigh. He died the next day; I don't know just what time; I was at work and I don't know just what time he died. Yes, sir, he was an active, healthy looking man up to the time that he came home shot. Yes, sir, he talked just as strong as ever.

Cross-examination:

I had been on guard at the Thomas yard. Those were the joint yards for the inspection and handling of trains of the St. Louis-San Francisco Railway Company, the Illinois Central Railroad Company and the Central of Georgia Railway Company; yes, sir. Mr. Mills did not do joint work while I was there. Each road had inspectors there. I don't know about any joint work of the inspectors in joint movements of the cars. About seven o'clock that night was the last time I saw Mr. Mills before he was shot, and I know nothing at all about what he did between seven o'clock that night and the time that he was shot. I went off duty at that time; at seven o'clock. No, I didn't see the orders of the train, to go to Amory, but that is what the engineer was raising sand with him to get it ready; he said he had to go to Columbus. That is the way I got my information that the train was to go to Amory; I did not see the orders. All that I [fol. 24] know is what the engineer told. I do not recall any other specific car that I saw him inspect that night, of which of my own knowledge I knew the destination; I did not go around and examine them to see where they were going. Of course, I could have. But I have seen him inspecting trains that were marked to different places, but on this night I don't know whether I even noticed it or not. I don't remember that I saw him do anything of the sort on that particular night, or on that afternoon; I did not go around and examine to see where they were going. There were all sorts of cars in the yard—cars that had interstate destinations, and some that were moving around in Birmingham, and some that were out of repair.

Mr. Mills was a car inspector, he inspected the trains and made light repairs. He inspected a Frisco train that evening. At the time of my employment as an officer of the Frisco I had a deputy sheriff's badge and license. I couldn't tell you how many there were employed there as guards or deputies at that time; I am satisfied there was fifty or seventy-five. I know when they moved over here on the night force I had forty-four the first night. Yes, sir, there was a large number of deputies all right. I had about five or six men at the Thomas yards under my protection. And over here—when they moved me over here I don't know how many there was; there was fifty or seventy-five. I was moved over to Ninth Avenue. When I was working at the Thomas yards I had something like five or six men under my protection. Whenever they quit work, or went to work, I went with them to protect them; yes, sir.

Redirect examination:

The Frisco Railroad employed and paid me as a deputy sheriff. At the Ninth Avenue yard at one time I had forty-four men under [fol. 25] me; I had to see after them; I made the round every hour. Attorney for defendant admitted that the guards were employed and paid by defendant.

Recross examination:

I just had charge of going around and seeing that they were on the job.

By the Court:

Q. Was this train headed west?

A. It was headed west.

It was not coming to Birmingham; it was going the other way.

I think the eastern terminus of the Frisco Railroad is Birmingham, and was at that time.

A. D. Weathers, a witness for the plaintiff, being first duly sworn, testified as follows:

My name is A. D. Weathers and I am working for the L. & N. Railroad Company at Albany, Alabama, in car repairing. I knew Mr. Ira S. Mills and I was with him at the time he was killed. I had been working with him some three or four days before and up to the time he was killed; we were car inspectors, inspecting cars for the Frisco Railroad; I was doing that all the time that Mr. Mills worked there; he had been working there some three or four days when he got killed; I don't remember. I had been working longer; I went in somewhere in July, about ten days, I suppose, after the strike—somewhere near the 10th; I don't remember just the day that I started to work, but it was somewhere right along the 10th. It was about twenty-five minutes to twelve at night that Mr. Mills got killed. We got off at eleven o'clock and were both on our way home, to our

respective homes, at the time he was killed. A guard by the name of Cantrell was with us; he was a young man, I would not take him [fol. 26] to be over twenty or twenty-one years old. He was a guard in the employ of the Frisco. I was unarmed; Mr. Mills was armed. Yes, sir, I know what happened on the car.

We got off from work at eleven o'clock, come over to a place on the Pratt-Ensley car line—I disremember the name right now, but it was right near the East Thomas stop, to get on the car. There was myself, Mr. Mills, and this guard, Cantrell. He came with us. When we got on this car, there were three men standing on the platform, on the rear platform. We hadn't went but just a short ways, say past maybe one or two stops—it was only a short ways—when there was some one got me by the arm, and they said "Get on off here, Get on off, Your days are come," with an oath. I raised up to my feet, grabbed this man's gun that had it in my face—one of those three men. At the same time, everybody began to shoot, and I saw Mr. Mills fall over a seat in the street car. I couldn't tell who started the shooting, because everybody started to shooting, it seemed like to me, at the same time. I don't think Mr. Cantrell did any of the shooting. Mr. Cantrell got out of the window and by the time I got up, Mr. Cantrell was gone. The man got a hold of me the time the street car stopped, I got up, I got out of the window, I couldn't see anybody but Mr. Mills. The man got a hold of my arm, and when I raised up and had my eyes on the man, I had my eyes on the man that had the gun on me; I wasn't looking to see who had disappeared; and I grabbed the gun, and by the time I grabbed the gun some one began to shoot. Now, which way the first shot was fired from, I couldn't tell, but they began to shoot, and I looked and seen Mr. Mills fall over this way, and I jumped out of the window on the opposite side. Now, Mr. Mills was the only man that I seen when I [fol. 27] looked back that way, when I first looked. I didn't see Cantrell at that time. Up to that time Cantrell and Mills were sitting on the seat that was running this way (indicating) to the car on the right hand side, and I was sitting on the left hand side coming to town; and Mr. Cantrell was sitting back next to the platform. I was sitting on the left hand side and they were sitting on the right. Yes, sir, they were sitting on the same side of the car; Mr. Mills was sitting up towards the front and Mr. Cantrell was sitting toward the back platform. There are two little seats on the back that run along that way. I was sitting on the left hand side on one, coming to town; and Mr. Mills and Mr. Cantrell were on the one on the right. I couldn't tell whether or not the first shots came from the back platform or from the seat that Mills and Cantrell were on, because there was just some shooting, and that is all I know; I couldn't tell which way the first shots were fired, or anything. I recognized these men; I had seen them before. I would say they were strikers, yes, sir. I had been threatened by the strikers before, and I had reported it to someone for the company to Mr. Tyler, the boss of the guards. Well, on Sunday night before Mr. Mills was killed on Thursday night, was when I got my first tip that they were after me, and I called Ser-

geant Tyler; and then on, I believe it was Tuesday night—Monday night nothing happened—Tuesday night I heard it again; Tuesday night he told me to come on and get off at the usual place. Mr. Tyler told me on Tuesday night to come on and get off at the usual place and he would have some one there to meet me. When I got off there, there was two men to meet me, and there was a United States deputy marshal and one of the guards was there to meet me when I got off there that night. Well, Thursday evening I was back [fol. 28] at the office again, the office of the company, and I heard a switchman discussing over the telephone, stating to some one where I got on the car at, telling just exactly, and I was standing right behind him, and he said, "Bill, I'll call you again," and I picked up the receiver and called my wife, and called Sergeant Tyler and reported it again; and Sergeant Tyler said there was no need to be scared, it was just a bluff. I told the boss of the guards. Mr. Tyler was the boss of the guards, and then I went and found the man they had for boss out there, Bill Wilkins, I won't be positive, and then I went and told Mr. Wilkins about it. Mr. Cantress was the guard assigned to take Mr. Mills and myself home, the same man I have been talking about.

At this point counsel for the plaintiff asked the witness the following question:

"Q. What kind of a man was he? How did he act?"

The defendant objected to the question upon the ground that it called for a conclusion, the Court overruled the objection, and the defendant then and there in open court duly and legally excepted. Thereupon, without the witness answering the question, counsel for the plaintiff asked the witness the following question:

"Q. Describe as best you can, how he acted as guard?"

The defendant objected to the question, the Court overruled the objection, and the defendant then and there in open court, duly and legally excepted, and the witness answered:

"A. Well, he was just a great big bluff."

[fol. 29] The witness testified as follows: "He was always taking his gun and talking about he would like to shoot a man." Whereupon the Court cautioned the witness to state the facts. The witness then stated: "Well, I want to tell Your Honor that he was such a coward that I went back and told Mr. Tyler." Whereupon the Court then reprimanded the witness and instructed him to state the facts and not give his opinion about it. The witness then testified:

He was nervous and showed that he was scared and I reported these facts to Mr. Tyler, my superior. This was on Thursday evening before Mr. Mills was killed on Thursday night. Mr. Tyler sent out the same guard with us. Mr. Cantrell got on the car with the butt of his pistol showing from under his coat; one of the three men that got on the car looked at the other and laughed. That was the only

comment that was made. The other one—one of them looked at the butt of his gun and looked at Mr. Cantrell and laughed. If there were any other remarks I couldn't say. I was sitting right opposite Mr. Cantrell and Mr. Mills. No, sir, Cantrell did not shoot, that I know of. It was a very short while from the time the man caught hold of me, before I looked aound, but I couldn't give you just the definite time; it was just a very short time, because the whole thing, I don't suppose, would have lasted over fifty seconds or a minute; the whole thing, the whole shooting, the whole thing was over in almost the fraction of a minute; and when I looked around Mr. Mills had fallen across the seat. I couldn't tell you what became of Mr. Mills because I left him on the street car, and went to the hospital looking for him and before he got at the hospital; they brought him to the hospital a short time after I got to the hospital. He died the next day. Mr. Mills was not present at any time when I was talking [fol. 30] with Mr. Tyler. He was with me when I was talking to Mr. Wilkins. At this point counsel for the plaintiff asked the witness the following question:

"Q. Well, what were you talking to Mr. Wilkins about?"

The defendant objected to the question upon the ground that it was not shown that any talk with Winkins was binding on the defendant,

whereupon, the Court asked the following question:

"Q. What was his job?" and the witness answered:

"A. He was an officer out there. He was over the men that was at East Thomas yard."

He was one of the Frisco guards. Well, he was over the men at East Thomas; the guards, yes, sir.

At this point counsel for the plaintiff asked the witness the following question:

"Q. Well, what was said by him in the presence of Mr. Mills?"

The defendant objected to the question upon the ground that what was said in the presence of Mills would not be competent evidence, and because it was not shown that any talk between Weathers and Wilkins was binding on the defendant or that it had any bearing on any issue in the case, and that it called for immaterial, irrelevant, incompetent and illegal testimony. The Court overruled the objection, and the defendant then and there in open court duly and legally excepted, and the witness answered:

[fol. 31] "A. I just told Mr. Wilkins the conversation I had heard over the telephone. Mr. Mills was with me. We had went up to the office up to where Mr. Wilkins was staying in a little shack up there, and I related to Mr. Wilkins what I heard over the telephone."

Thereupon, counsel for the plaintiff asked the witness immediately thereafter, the following question:

Q. And what did he say?"

The defendant objected to the question upon the same grounds assigned in the objection to the previous question, the Court overruled the objection, and the defendant then and there in open court, duly and legally excepted, and the witness answered:

"A. He said it was just a bluff, that they were not going to bother us at all, just to go on home and pay them no attention at all, that they were not going to bother us."

I couldn't estimate how many guards the Frisco had to guard the men who were taking the places of the strikers, only just at East Thomas. There were about seven on at East Thomas in the day time, and maybe the same number at night. Guards, yes, sir; there was only one man on most of the time at East Thomas as car inspector, just one man. That was Mr. Mills as car inspector at night. East Thomas is a joint yard between the Frisco, the Central of Georgia and the I. C. Mr. Cantrell, the guard who was with me, was present during the conversation I had with Mr. Wilkins at East Thomas; he went along with us. He went with me everywhere I went in the yard, and he was with me and Mr. Mills. My job was car inspector. Mr. [fol. 32] Mills and I went together all the time; we were joint inspectors of the same trains; yes, sir. I knew Mr. Jenkins, the day guard. He was on duty up until—I don't remember just the hour that they changed—but he was on duty there whenever Mr. Mills and I went to work in the afternoon. On the afternoon of the day that Mr. Mills was killed, we went to work at three o'clock. From that time until we got off, Mr. Mills and I were looking after incoming trains and looking after the trains that they were making up on an outgoing train, and taking care of the transfers. I disremember the number of the last train that we inspected, but it was a Frisco train going west; going out for Amory, Mississippi. We started that train in the afternoon. I found an L. & N. coal car that wouldn't pass interchange, and I had thrown it out, and when the engineer kicked it back off the siding, pulled it back off the switch, he didn't kick it far enough, and he came up there on it; as he passed by it caught part of his engine and it tore off part of the pipes on the tender of his engine and it put his engine out of commission; his engine had to go back to the roundhouse and get another engine before the freight could go out. Yes, sir, we inspected other interstate trains that night; we had one train from Amory and a coal train from Dora coming in. About the last thing we did before we left, was to get that train out—the train going to Amory. We got it out somewhere about after ten o'clock, the train going out. That was about the last thing that we did before we were relieved from the night men, and the morning men came on. We were paid wages of sixty-three cents an hour. We had been working twelve hours a day up until Mr. Mills came over. When Mr. Mills came over we had enough men to give two men on the shift and we were only working eight hours at [fol. 33] the time Mr. Mills was killed. Mr. Mills was a competent workman. Mr. Mills worked regularly all the time he was there; so

far as I know, he was a sober, industrious man. I had not known him before the beginning of that week when I began to work with him. I do not know how many Frisco men employed at that place were out on strike at that time. You mean at East Thomas? If I am not mistaken there was only seven on strike out there at East Thomas, where I was working. All of the old men, car inspectors and car repairers at other places in the district were out on strike, and we had taken the place of the strikers. I saw Mr. Mills in the hospital before he died. When they brought him in that night, he just told me, "Well, Weathers, old boy, they've got me; they've shot me all to pieces"; and then I seen him the next morning and he just told me they kicked him off the car, but he didn't tell me how he was suffering or anything. Of course he was in pain; he said he was in pain, but he didn't show any emotion.

Cross-examination:

We left the yards that night about fifteen minutes past eleven; something like that. We got through inspecting the train that was going to Amory somewhere between ten and eleven; I don't remember just the time. We did nothing at all after that except taking our lanterns and wrenches and what few hose we had in our arms back up to the shacks, and go and turn our reports in to the office, and by that time the night men were there and we washed and cleaned up. I wouldn't think it was over a half mile from the yards to where we had to walk to take the car. We were not molested going from the yards to the station; I have forgotten that station; I don't remember whether it was Weaver or McClure. Prior to the [fol. 34] shooting Mr. Mills was sitting on the right of the car on the rear end and on the seat running this way (indicating) on the right, up next to the first seat running this way (indicating) crossways of the car; and Mr. Cantrell was back towards the platform, closest to the platform, and I was sitting on the same kind of seat across the aisle from him. The men on the back platform that were involved in the shooting were on the car when I got on. It was only a very few minutes from the time I got on until the shooting began; we had passed just one station—the negro park. The three men on the back platform said nothing to me, or to Mr. Mills or Cantrell; they made no remarks to me and no threats against me; one of them looked at Cantrell and laughed. When the man caught hold of me, I was kind of leaning back kind of to the side, this way, not looking exactly towards the front, but looking kind of in this position here (indicating). My attention was first attracted just as the car stopped, by this man coming up and putting his hand on my shoulder. He told me to get off, my days had come, with an oath. He didn't do or say anything to Mr. Mills. Why, the shooting commenced by the time the words got out of his mouth. The three men on the back platform all shot, I think, but I don't know whether this fellow whose gun I had shot, I couldn't tell; the others shot; the shots came from that direction. It is my best recollection

that those three men on the back platform started the shooting. I couldn't tell how long it was after I was engaged in the struggle with this man who had the gun on me before the shooting began; we both turned it loose about the same time; I let it fall in the aisle and so did he, and I went out of the window and I don't know which way he went. I don't know what became of the other two men on the platform. I couldn't tell you how many shots were fired, and I [fol. 35] don't know exactly in what direction each of the shots came from, because some one shot after me after I got out of the car. Mr. Mills was armed; I saw his pistol at the coroner's inquest and it had one cartridge fired out of it. The whole thing happened in a very few seconds; it started and was over almost at the same time; that was about the way it was. I wasn't paying any particular attention to where Mr. Cantrell was; I wasn't looking out for any one but myself; I can't say whether he shot or not. When the shooting was over and I looked around, Cantrell was no longer in the car, and the men who started the shooting were no longer in the car, either; at least, I didn't see them.

The car had just come to a stop when the shooting began. As I went around the car, come around the car, why, some one from the front end of the car opened fire on me again, shot at me three times from the front end of the car; I did not look around to see whether it was from the ground or from the inside of the car; I just know it was from the front end of the car; I just know it because I got some powder on my sleeve. I jumped out of the window of the car on the same side that I had been sitting on. I couldn't tell you how long it was after the man grabbed me and put his gun on me, before I went out of the window; times was too valuable for me to count it; I couldn't tell you; I got out as quick as I could. No, sir, Cantrell wasn't a large man; he was a full, slim boy. I don't know of my own knowledge what his age was; it is just my judgment that he was twenty or twenty-one. He had been acting as guard for Mr. Mills and myself together for just two days, but he had been guard with me for something like a week or more. Prior to that time I had encountered some trouble while Cantrell was with [fol. 36] me. Mr. Cantrell run and left me down there with a train out across the road and wouldn't stay down there with me. Mr. Cantrell left me down the road going out beyond East Thomas one time; the train broke loose and he wouldn't go down there with me because there was some men down there. Yes, sir, he ran and left me by myself. Well, he left me by the office; I don't know that he actually ran, but he actually left me and went back to the office. No, sir, that was not at Ninth Avenue. We had made a train up, and the train started across, going west, towards Pratt City; and right after crossing the road down there, between there and the street car line, the train broke loose; and when it broke loose, why, I had went down there to inspect the trouble; and when we crossed the road there, why, Mr. Cantrell wouldn't go with me any further. Yes, sir, there were some pickets down there; there were four or five men sitting in a Ford automobile; I didn't know them at all; I don't know who they were. I went on by myself after Mr. Cantrell

left me on that occasion. The men sitting in the automobile called me "scab" and "scaly," and told me that they would get me, but they did not offer me any violence on that afternoon.

JOHN JORDAN, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

I work on a section, of the L. & N. Railroad. I was on the street car on the night of August 3rd, 1922, when Mr. Mills was killed or shot. I saw some men on the back platform of the car shortly before Mr. Mills was shot. Yes, sir, I saw somebody go back to them and speak to them. The motorman, he goes back—or the conductor, he goes back there and talks to them; and just a little before he gets [fol. 37] to the place where the shooting was done at, he takes up fares of some more folks that got on, that I doesn't know, at stops. So when he gets up to where they done the shooting at, just before, a little before he gets up to where they done the shooting at, he comes up to the motorman—I say just before he got another stop down there—I don't know the name of none of them stops down there—he goes back there and he talks to these three fellows, and then he takes up the fare before he gets to the place where the shooting was done at; and then he goes up here where the motorman was at and stood up by this tin behind the motorman; and just as the car rolled up, the shooting takes place, and I turned the fan on. I turned and run—I turned the fan on. The tin that he stood on just before the shooting was done, was this tin right behind the motorman; there's a tin behind the motorman and the door when you go in the car; I calls it tin; yes, sir, some metal; I don't know what it was, but I calls it tin. That was between the motorman and the inside of the car; yes, sir, and the conductor got behind that; he got on the same side that the motorman was on, in the front.

I couldn't hear what the conductor and these men on the back platform were talking about before that. The shooting began just as the car rolled up there for some lady there at that stop, and somebody rang the bell for to get off. A colored woman got on there. I didn't notice whether there were any white men on the ground before the car stopped. I didn't know Mr. Mills; I didn't know any of them at all, that was shot.

(No cross-examination).

MARY LUCAS, a witness for the plaintiff, being first duly sworn, testified as follows:

[fol. 38] Direct examination:

My name is Mary Lucas. I was at the station on the street car line on the night of August 3, 1922, the night that Mr. Mills is said to have been killed. I was waiting there to get on the car, and there were also two white men waiting there. I was on the left hand side of the car as it came towards town, facing the side they boarded the car on. I did not see any white men get off the car before the shooting, but I did see some men running from the car after the shooting; I couldn't tell how many there were; there was so many of them I couldn't tell; I could only see them in the glare of the electric lights from the car. I don't know whether I saw Mr. Mills, the man who was shot, or not; I remember seeing one man with a light suit on; I don't know whether that was the man or not—and a straw hat; he was running across the street under a light. He was by himself and crossed the track, that is why I saw him. The others went up the track, seemingly—the other people that I saw running. Why, I didn't get on the car. No, sir, I hadn't gotten on the car then when that happened. I only saw the man shot on the car, and I got on; he was standing up in front of the car in the middle of the aisle.

Cross-examination:

I saw one man cross the track after the shooting. He was dressed in a light suit and had on a straw hat. I couldn't tell how many went up the track; I saw the people running. Those two men that I saw standing there, they didn't go up the track at all; they went up the hill, I think; I didn't see them. Well, I saw several people get off the car there; I think Mr. Stepney and Mr. Roper and Mrs. Reuser and Mr. Ross—I knew them—and the motorman, I know [fol. 39] them personally. They was all supposed to get off the car there, that was the last stop, they was supposed to get off there like I did. I didn't see anybody come through the windows. The man I saw cross the track went on up towards the Jewish cemetery; he was running, and was dressed in a light suit and a straw hat. That was the only person I saw that was running. Of course, there was other people going up the track, I couldn't see them good. I didn't see him go off the track. He was a white man that I saw cross the track. I didn't see him get off the car because he got off the back, and I was standing in the front; he got off at the back entrance.

JULIA ROSS, a witness for the plaintiff, being first duly sworn, testified as follows:

I was a passenger on the street car on which Mr. Mills was shot, on the night of August 3, 1922, and I saw three men on the back platform before the shooting. These men got on at the City League

station. This was about four —about four stations before the shooting occurred. I seen the conductor go back and talk with them, but I don't remember anybody else talking with them. I don't remember what he did after that, no more than he walked back up there and talked with the motorman, but I don't remember anything else that he did. After the conductor went up there where the motorman was, the shooting taken place then, but I had gotten up and walked to the front end of the car. I was sitting on the lefthand side of the car, coming to town. I remember seeing two men sitting opposite me on the long seat that runs lengthways the car, across the aisle from me, in the back end of the car. Yes, sir, I saw them when the shooting taken place at the back end. One of these men was one of the men that was shot; there were two men [fol. 40] that were shot and one woman. I couldn't tell just exactly who did the shooting, because I was getting off the car; it was my time to get off, and I had gotten up to get off, but of course I saw the light of the balls and heard the report of the gun, but I couldn't tell directly who was shooting because—the shooting seemed to come from the back end of the car. I did not see either of those men sitting on the long seat shoot. All the shooting that I heard seemed to come from the back platform of the car; the red balls. I saw it from the back end of the car.- I couldn't tell just exactly how many shots were fired, because it sounded just exactly like pop corn in a pan to me. Yes, sir, there were several of them. No, sir, I don't know what became of the two men sitting on the long seat, because after they knocked me unconscious I didn't know anything more until the motorman come and picked me up.

Cross-examination:

The colored people were ssitting in the front end of the car, in front of the white people. There weren't any white men sitting on any of the seats at all up in front of me the way the car was headed. I don't know who did the shooting; I just know the shooting was done at the back end of the car. I was sitting with my face to the front end of the car, but I had gotten up before the shooting begun. The car was slowing up, it hadn't stopped, and I walked to the door and I had stepped down to the platform and caught hold of the rod, and I heard the report of the gun and I thought it was electricity in the car, and I looked up and I didn't see none, and that was how come me to see the balls, and that was how come me to see the shooting.

I was sitting down when the conductor went back and spoke to those men on the back platform, and I was facing the front of the [fol. 41] car, but I saw the conductor talking to those men on the back platform. I reckon he went back there to collect the fare, when he talked with these men, because they got on at City League. I couldn't tell you how long it took to run all this distance, but I can tell you how come me to notice these men back there. Because there don't any white people ride that car that late at night, generally, you see. That was what made me notice him.

Mrs. Odell Mills, the plaintiff herein, called in her own behalf, being first duly sworn, testified as follows:

Direct examination:

My husband was shot on August 3rd; he died August 4th. I am Mrs. Odell Mills. I am the administratrix of the estate of my deceased husband. I was dependent upon him for support at the time of his death, and we had one child, this little boy here, and he was dependent upon his father for support up to the time of his death, also. My husband was earning about five dollars a day at the time of his death. It took what he was earning to support his family. He was twenty-four years old, and was engaged in the grocery business at Cordova. He had been down working for the Frisco about four days. He was at that time still supporting his family; we had not been separated, or anything of that sort. He was a sober, industrious man, and healthy up to the time he was shot.

(No Cross-examination.)

The foregoing was the evidence, and all the evidence, introduced upon the trial of said cause.

Charge of Court to Jury

Thereupon, the Court charged the jury orally as follows:

[fol. 42] "Gentlemen of the Jury: The plaintiff in this case is Mrs. Odell Mills, the administratrix of the man who was killed, who was shot to death, and she sues the St. Louis-San Francisco Railway Company under the Federal Employers' Liability Act. Her husband was an employee at the time he was killed. The Federal Employers' Liability Act relates only to carriers who are engaged in interstate commerce. (a) So the first question is to determine whether Mr. Mills was an employee of a kind that could have brought a suit, had he lived, under the Employers' Liability Act. If he was, then, of course, his administratrix could bring a suit for his death.

"Now, that, as I said, requires you to find two things: first, if the St. Louis-San Francisco Railway Company was engaged in interstate commerce, generally—and that is not disputed, you needn't to bother about that, because there is no contention to the contrary. The other is, that Mr. Mills, at the time of his death, was employed in interstate commerce. That must be true, or else he could not bring a suit under this act at all, which is sued under, whatever right of action he may have otherwise; and you are only concerned in that he has sued under the Federal Act.

"Now, if he were acting as inspector or repairer on a train that was destined to go from Alabama to Mississippi and was injured in the act of making those repairs or of the inspection, then he would be considered to be employed in interstate commerce at the time of his death.

"Now, there is evidence tending to show on the evening of his death, and I believe some of it tends to show at the close of his day's work on the evening of his death, he and Weathers did inspect a [fol. 43] train destined to Amory, Mississippi; and if you believe that to be true, then he would be, so far as he was engaged in that inspection, employed in interstate commerce, because he would be engaged in inspecting an interstate train, a freight train.

"However, he was not hurt in the actual inspection of the train nor was he hurt while he was on the company's premises, but on hi way home. (b) Now, of course, there would have to be shown a duty on the part of the company to take care of him beyond his place of work and to his home in order that he remain an interstate employee when he was shot—even though he were one when he was inspecting that train, if he was inspecting it, as testified to by Weathers. Now, ordinarily, his relations to the company would cease when he left its premises. Of course, it might be that a further duty was created by the terms of his employment, or by custom, that he continued to be an employee until he reached his home; (c) and you would have to find that in this case in order to put him in the status of one who had a right to sue under this Act, and he would have had to remain an employee, not only on the company's premises, but at the time of the shooting, that is, on his way home, and, therefore, until he got home, in order that he be entitled, or that his administratrix be entitled to sue under this Act.

"Now, as I say, ordinarily he would cease to be an employee when he left the company's premises. They were bound to furnish him safe egress from their own premises on his way from his work home. Ordinarily it would cease when he left the premises. It might by implied contract, by a custom that existed in that employment, they owed him a duty to protect him further. If that were true, he would [fol. 44] be an employee and an interstate employee just as long as that duty on the part of the company continued. (d) That is to say, if there were a duty that attended while he was on his way home on the part of the company to protect him and to give him protection, then a violation of that duty would be a violation of a duty to an interstate employee while he was on his way home from doing interstate work at the company's premises.

(e) "Now, it is for you to say whether he was an employee in the sense that he was engaged in interstate commerce or employed in interstate commerce at the time of his death, depending, as I say, on whether or not he did work before the left the yards inspecting interstate trains; second, whether he was protected by employment or custom that existed in this case that he was to be protected beyond the limits of the company's property and to his home.

(f) "If you find those two things, then you have a right to say that he was an interstate commerce employee at the time he was shot. If you fail to find them, or could not find both of them, then you could not give it that character, and your verdict would be for the defendant. Now, that is the first proposition.

(g) "The next proposition is whether there was any negligence on the part of the company that he could complain of as an employee under the Federal Employers' Liability Act. That act is for inter-

state carriers only and makes them responsible for any negligence of their appliances or for negligence to any of their employees who are hurt.

"Now, negligence means a departure from the standard of care that an ordinarily prudent person in the same kind of business would exercise under the same circumstances.

[fol. 45] "The company is not an insurer of the safety of employees. A carrier is not, under the Federal Employers' Liability Act—do not insure their safety, do not guarantee that they won't get hurt. The obligation the statute puts on them is to use due care or reasonable care—that of an ordinarily prudent man—to keep their employees from being hurt, and no more; and if they are hurt in spite of that due care, the accident is considered unavoidable, and there is no negligence, and they cannot recover. There must be negligence; and negligence means that departure from the standard of care which an ordinarily prudent man in the same kind of business under like circumstances would exercise.

"Now, negligence also implies that there must be a duty, which has been negligently failed to be observed. Of course, if there is no duty to do a thing, then there cannot be a want of care in not doing it, even though it might be safer if it was done. There must be a duty to do it before a negligent failure to do it could be a lack of due care and give the person injured a right of action.

(h) "Therefore, your first inquiry on this would be whether there was any duty on the part of the railroad company to protect him against assault from strikers at the time he was hurt. If there was not, then that ends the case. If there was a duty, then you would have to inquire further whether there was a negligent failure to observe it or whether it was observed all right.

"Now, let us talk of the duty first. It is quite clear that unless there were some unusual circumstances there would be no duty to protect employees, even during a strike, after they had left the company's premises. If a man hired out to take another man's place after he had left it on a strike, and he knew that there was danger of [fol. 46] injury from the strikers whose place he had taken, and there were no assurance on the company's part that he would receive any protection after he left its premises, then he would take his own risk of gettting hurt by the strikers after leaving the company's property; and if he were hurt, then that would be his loss and he could not make the company pay for his injury.

(i) "Of course, that rule could be modified by a contract made between him and the company that they would protect him or give him protection, not only while he was on their premises, but while he was going to and fro between their premises and his home. And if they undertook to do that by the express terms of his contract of employment, why then that would impose on them the duty to use due care to that end.

(j) "So it is that if, by custom, they had been furnishing protection for such length of time as would induce employees to believe that employees would be protected and they would undertake to furnish protection, then it would be a question of fact for you to de-

termine, not me, whether out of that custom a duty would or would not spring up to furnish protection, not only on the premises, but on the journey of the man to his home. (k) That is to say, if for some length of time they had been in the habit of furnishing guards to take the men to their homes, and the men had been working under that custom, undertaking a surety, then it would be a question of fact whether a duty arose from those acts on the part of the company to continue to furnish guards on any particular trip.

"As I say, you will have to get at that, if at all, from something unusual, because ordinarily there is no doubt a man can take his own risk after he leaves the company's premises; and there would have to [fol. 47] have been some affirmative action on the part of the company, or a contract which changed the rule of law and gave him the right to say that it was the company's duty to continue to furnish him protection.

"Now, if you find there was no duty, other than the general duty, when he ceases to be on the premises, then, of course, the plaintiff's case ends, because, of course, if there was no duty, there could be no negligence. Negligence depends upon a duty; and if there were no duty, then the failure to do it could not be negligence, even though that might have been safer for the employee for it to have been done or he may not have been injured if that had been done. (l) You must find there was a duty in order to predicate negligence.

"If you find there was a duty, then the next question would be whether the duty was properly observed or whether there was negligence in its observance. Of course, if there were a duty to protect and they gave him protection which the law says is such as due care required, then there could be no negligence; and being no negligence, even though the duty existed, then there could be no recovery on the part of the plaintiff, because, as I have already told you, she must recover by virtue of there being negligence, because negligence is the basis of the Federal Employers' Liability Act for recovery.

"Now, as I said before, negligence means a departure from due care that an ordinary prudent person would exercise in like business under similar circumstances.

"Now, the negligence could be that of any employee of the St. Louis-San Francisco Railway Company. It could have been of Cantrell, if Cantrell had been guilty of negligence; that is to say, his grade of service, if he had been negligent, if he had been negligent and had caused the plaintiff to suffer because he was negligent, then [fol. 48] that would be the kind of negligence or negligence of a kind that would justify recovery under the Employers' Liability Act, even though it was disregarded. But, as I say here, what happened on the street car is so vague that it is impossible to say that Cantrell either did or failed to do something that he should have done, or should not have done, or that any injury was done to Mr. Mills on that account, that is, his being shot, was caused by that. There is nothing to submit to a jury as to Cantrell's negligence on the instant occasion; they are all instances of suspicion, but no facts that anything that he could have done, or he didn't do, or anything that

would have avoided the injury to Mr. Mills would have been possible for him under the circumstances. So I don't leave the case to you on the idea that Cantrell was incompetent and was negligent. I will say whether he was competent or not makes no difference, unless he was negligent at the time of this duty in a way that allowed Mills to be shot and that would have been avoided had he exercised due care. But it is all guesswork, it seems to me, as to how the shooting occurred. Therefore, I will charge you that you cannot give the plaintiff any damages because of Cantrell's supposed negligence at the time of the shooting.

(m) "Now, the other contention of the plaintiff is this: She says that there was an inefficient guard, in numbers, furnished the decedent, Mr. Mills, and that that was negligence, and that if there had been a sufficient guard, in numbers, furnished, the assault would have been prevented by the presence of more guards and the plaintiff's intestate would not have been killed.

"Now, as I said at the outset, the railway company doesn't have to guarantee or insure the safety of its employees on occasions like this or on any other occasions; it only has to do what a reasonably pru- [fol. 49] dent person would do under like circumstances.

(n) "Now, in this case it seems to me your attention should be converged on what Wilkins did, because, as I understand, the railway company itself had guards around and could not be charged with negligence in not furnishing sufficient guards at East Thomas.

(o) The question would be, it seems to me, whether Wilkins under the circumstances sent enough guards with these two men, Weathers and Mills. And Wilkins is not to be tested by the test of infallibility; he is not required to act as a man who makes no mistakes; he is required to act, however, as a reasonably prudent person would in his business under like circumstances. If he does, though he acts mistakenly, then he is guilty of no negligence. If he does not, if he acts as a reasonably prudent person would not act, then he would be guilty of negligence. Now, that would depend on whether he could have reasonably anticipated danger to the extent of determining if one guard was sufficient to guard Weathers and Mills. As I understand, up to this time they had been in the habit of sending but one guard, and there had been no assaults and no violence. So, as far as the past history of the strike was concerned, there was nothing claimed to charge him with any knowledge of any assault like to be committed on him, and, therefore, that more than one guard was necessary; I mean anything in the way of violence before this time. There is, however, testimony—that of Mr. Weathers—that he went with the deceased, Mills, and with Cantrell, and reported a conversation that he had overheard over the telephone between a switchman and somebody on the outside, and had reported also at a previous time that threats had been made to get him, and [fol. 50] he says that Wilkins, who was in charge of the guards at East Thomas yard, said it was all a bluff and that there was no danger, and that he permitted the men to go home with Cantrell and with Cantrell alone.

(p) "Now, the question is whether you believe that a reasonably prudent man would have anticipated danger, if you believe that those things were told to Wilkins, from the reports that were made to him, were of such a character that would have made a reasonably prudent man have reinforced the guard and send the guards with them; and that depends altogether upon what you believe a reasonably prudent man would have done under the same circumstances, what he would have anticipated was the danger, how great he would have anticipated the danger was, and the circumstances, from the reports made to him. If you believe that a reasonably prudent man would have acted as he did and would have sent the men along or permitted them to go along with Cantrell and nobody else, then no negligence could be predicated on Wilkins' part. (q) On the other hand, if you believe the reports were made as stated by Mr. Weathers, and if you believe from all the circumstances and the situation of the strike, a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he would have sent more guards than one guard, then that failure to send more guards than one guard, you might say was—you might find was negligence on the part of Wilkins. It is for you to say whether it was or not. That is entirely a question of fact, and all I do is to lay down the standard, namely, that the care exacted is that of a reasonably prudent man under like circumstances when in a like situation.

[fol. 51] "Now, if you are reasonably satisfied as I say, that that degree of care was exercised by Wilkins, under the circumstances, then there would be no negligence, and the defendant would be entitled to your verdict also on that count. (r) On the other hand, if you are reasonably satisfied that there was a departure from due care on the part of Wilkins, and that he was guilty of negligence in not sending more guards along with Weathers and Mills, and you find that to be negligence on his part, (s) then you would next inquire whether it was a cause or proximate cause of the plaintiff's intestate's death. Of course, negligence don't amount to anything unless it causes the injury, in a civil suit. This suit is for damages for the death of Mr. Mills, and any negligence that did not result in his death would be entirely aside from the question in a civil case like this; there must be negligence, and it must be the proximate cause, the direct cause, of his death, in order to be recoverable in the interest of the plaintiff.

"Now, whether that—in other words, the proposition as to the proximate cause would be this: If you have hitherto found that there was a duty to furnish protection in favor of the employees, and have found that there was a negligent failure to furnish such protection on the part of Wilkins, then you would next inquire whether that was a direct cause of plaintiff's intestate's death. If you believe—the burden is on the plaintiff to satisfy you that it was; you can't speculate, but you must find, not with entire certainty, but with reasonable certainty in your finding—(t) if you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also

find that a greater guard should have been furnished in the exercise of due care, then, then that would show that that was the causal [fol. 52] relation in the failure to furnish it and the accident resulting in the death of the intestate. On the other hand, if you are not able to reasonably say from the evidence that a larger guard, if one was required in the exercise of due care, would have prevented the assault and would have prevented the plaintiff's intestate from being shot, then you would have to find for the defendant in any event, because there would be no causal relation between the failure to furnish a greater guard and the death of plaintiff's intestate, which is absolutely essential for the plaintiff to recover.

"Now, that comes to the end of it. If you find that the plaintiff was an interstate employee up to the time he was shot—the plaintiff's intestate—if you find it was the duty of the defendant, the railway company, to afford protection against assault by strikers and that that duty went beyond their premises and on his return to his home, and if you find there was a negligent failure on the part of Wilkins to give him that protection by failing to furnish more guards, and if you find that that was the proximate cause of the plaintiff's intestate's death, then the plaintiff would be entitled to a verdict in damages. If any one of those things are not found by you, then the defendant would be entitled to a verdict. Of course, if you find a verdict for the defendant you don't enter into the question of damages.

"If you find for the plaintiff, then it would be your duty next to consider what damages she is entitled to.

"Now, under this Federal Employers' Liability Act the damages are altogether compensatory. They are not to punish the defendant or to make an example of the defendant or anything like that. They are meant to compensate the plaintiff for the pecuniary [fol. 53] loss that she has received or suffered from the death of her husband. And there is another element that I may refer to incidentally, and that is to be considered: what would be a reasonable compensation for the suffering of the decedent from the time he was shot until he died—which if you believe would reasonably compensate him for the pain that he suffered from the time he was shot until he died. That is one of them. The other element is to furnish a substitute for him to his dependent next of kin for what wages you believe he would have earned and contributed to their support during his expectancy of life—during the balance of life—during the balance of his life, as shown by his expectancy, and during their joint lives. Now, you can see that is a right difficult problem to get at, but that is a question that the jury must decide in their own minds if they come to the question of damages. He was earning five dollars a day for a short time before his death; and the evidence shows prior to that time he was engaged in running a store. Of course, there is no data on what he earned running a store. You would have to rely on what he earned at the time he was a car repairer and in which he was engaged for three or four days. There is evidence that he was healthy and industrious and sober and a regular worker and, I believe, competent

to do this job that he was doing. Now, you see the theory of this awarding of damages is to give the dependent next of kin—in this case the widow and the little boy—an amount that would be equivalent to what he would have furnished from his wages toward their support during their joint lives. Now, of course, what he earned and spent on himself you wouldn't consider, because that he never did contribute in his lifetime to their support, seeing he has spent [fol. 54] it on himself. Therefore, this five dollars a day you would leave out of consideration. Whatever amount you would believe it took to support them, and only that which he took out of the five dollars to contribute to the support of the wife and child; and then you would look to the support of the wife and child and their condition and expectancy and so forth; and you would not only say how long the husband would have lived, but how long he would have lived together with his wife and child, for that is the only time that he would have furnished them any support in the way of contributions. Of course, after they died he would no longer support them. So you will have to, in some way, the best you can, arrive at the period of time that he would have been living, and he or they, one or the other, would also be living. And you would not allow them, of course a sum of money which, put out at interest, would be equivalent to what he allowed them each year. That would not be fair to the railroad, because if you allowed it that way, they would get the whole benefit of his contributing capacity and also the principal sum out of which that income was paid, which they wouldn't get at all, of course, if he had lived. If he had spent all of his money on them, he would not have saved money in his life time; when he died his support to them, in a pecuniary way, would be at an end. On the other hand, if you acted on the idea that you would find some sum which, if put out at interest, would be what he contributed in support to his wife and child, and give them that sum, and then they would get this sum during his expectancy—which is all they would get in the case of his living; but in that instance they would get the principal sum, which they would not, of course, get had he lived and died at the end of the course of his natural life. Of course, at the time he died [fol. 55] he would not have had anything to leave out of his wages, having spent it all for their support during his lifetime. Now, then, under this Federal law, it is your duty to find, not only what would be reasonable compensation in that sense, his contributing capacity to his wife and child had he not been killed, during his life and their lives, but also to make a division of whatever sum you arrive at between the wife and child, who are the next of kin in this particular instance. You not only have to find an amount which would represent this contributing capacity, but you have to make a division of that amount, based on that amount, so much in favor of the wife and so much in favor of the child.

"Now, the burden is on the plaintiff to reasonably satisfy you of the things that are necessary to make her right of action complete, and, as I have said to you before, not beyond a reasonable doubt, but to reasonably satisfy you from a fair preponderance of the

evidence that her husband was an interstate employee when he was shot, that there was a duty to protect him on the part of the railroad company at such time, that there was a negligent breach of that duty on the part of Wilkins in not sending more guards to protect him, and that that negligent breach of duty was the direct and proximate cause of his death. As I have said to you, if you are not reasonably satisfied of every one of those four propositions, then the plaintiff has no right of action. If any one of them fails to be proven to your reasonable satisfaction, then the plaintiff's cause of action fails, because the burden is on her to sustain them all.

"Now, if you find for the plaintiff your verdict would be in this form: we, the jury, find for the plaintiff and assess her damages at whatever sum you arrive at as reasonable compensation for damages [fol. 56] to herself and child; and then you would say, we, the jury, find for plaintiff and assess her damages at that sum and divide the damages as follows between the widow and the child; and then you would just say, to the widow so much—what is the child's name?"

Mr. Harsh: Kermit. K-e-r-m-i-t.

The Court: And the widow's name is Odell, isn't it?

Mr. Harsh: Yes, sir.

(The Court thereupon further charged the jury):

"You would say to Odell Mills so much, and to Kermit Mills so much; and sign by the foreman. If you find for the defendant, the form of your verdict would be: we, the jury, find for the defendant."

Defendant's Exceptions to Charge to Jury

At the close of the Court's oral charge and in open court, before the jury retired, the defendant excepted separately and severally, to each of the following separate and several portions of the oral charge of the Court, lettered from (a) to (t):

(a) So the first question is to determine whether Mr. Mills was an employee of a kind that could have brought a suit, had he lived, under the Federal Employers' Liability Act. If he was, then, of course, his administratrix could bring a suit for his death.

(b) Now, of course, there would have to be shown a duty on the part of the company to take care of him beyond his place of work and to his home in order that he remain an interstate employee when he was shot. * * *

(c) And you would have to find that in this case in order to put him in the status of one who had a right to sue under this act, [fol. 57] and he would have had to remain an employee, not only on the company's premises, but at the time of the shooting, that is, on his way home, and, therefore, until he got home, in order that he be entitled, or that his administratrix be entitled to sue under this act.

(d) That is to say, if there were a duty that attended while he was on his way home on the part of the company to protect him and to give him protection, then a violation of that duty would be a violation of a duty to an interstate employee while he was on his way home from doing interstate work at the company's premises.

(e) Now, it is for you to say whether he was an employee in the sense that he was engaged in interstate commerce or employed in interstate commerce at the time of his death, depending, as I say, on whether or not he did work before he left the yards inspecting interstate trains; second, whether he was protected by employment or custom that existed in this case that he was to be protected beyond the limits of the company's property and to his home.

(f) If you find those two things, then you have a right to say that he was an interstate commerce employee at the time he was shot.

(g) The next proposition is whether there was any negligence on the part of the company that he could complain of as an employee under the Federal Employers' Liability Act.

(h) Therefore, your first inquiry on this would be whether there was any duty on the part of the railroad company to protect him against assault from strikers at the time he was hurt.

(i) Of course, that rule could be modified by a contract made between him and the company that they would protect him or give [fol. 58] him protection, not only while he was on their premises, but while he was going to and fro between their premises and home.

(j) So it is that if, by custom, they had been furnishing protection for such length of time as would induce employees to believe that employees would be protected and they would undertake to furnish protection, then it would be a question of fact for you to determine, not me, whether out of that custom a duty would or would not spring up to furnish protection, not only on the premises, but on the journey of the man to his home.

(k) That is to say, if for some length of time they had been in the habit of furnishing guards to take the men to their homes, and the men had been working under that custom, undertaking a surety, then it would be a question of fact whether a duty arose from those acts on the part of the company to continue to furnish guards on any particular trip.

(l) You must find there was a duty in order to predicate negligence.

(m) Now, the contention of the plaintiff is this: She says that there was an inefficient guard, in numbers, furnished the decedent, Mr. Mills, and that that was negligence, and that if there had been a sufficient guard, in numbers, furnished, the assault would have been prevented by the presence of more guards and the plaintiff's intestate would not have been killed.

(n) Now, in this case it seems to me your attention should be converged on what Wilkins did, because, as I understand, the railway company itself had guards around and could not be charged with negligence in not furnishing sufficient guards at East Thomas.

[fol. 59] (o) The question would be, it seems to me, whether Wilkins under the circumstances sent enough guards with these two men, Weathers and Mills.

(p) Now, the question is whether you believe that a reasonably prudent man would have anticipated danger, if you believe that those things were told to Wilkins, from the reports that were made to him, were of such a character that would have made a reasonably prudent man have reinforced the guard and send the guards with them; * * *.

(q) On the other hand, if you believe the reports were made as stated by Mr. Weathers, and if you believe from all the circumstances and the situation of the strike, a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he could have sent more guards than one guard, then that failure to send more guards than one guard, you might say was—you might find was negligence on the part of Wilkins. It is for you to say whether it was or not.

(r) On the other hand, if you are reasonably satisfied that there was a departure from due care on the part of Wilkins, and that he was guilty of negligence in not sending more guards along with Weathers and with Mills, and you find that to be negligence on his part, * * *.

(s) Then you would next inquire whether it was a cause or proximate cause of the plaintiff's intestate's death.

(t) If you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also find that a greater guard should have been furnished in the exercise of due care, then, then that would show that [fol. 60] that was the causal relation in the failure to furnish it and the accident resulting in the death of the intestate.

Defendant's Requested Instruction to Jury

After the close of all the evidence and following the charge of the Court, and before the jury retired, and at the time when the Court requested the parties to submit in writing, charges desired to be given, the defendant requested in writing the following written charge, which said charge was by the Court refused, and upon the same the Honorable W. I. Grubb, presiding Judge, wrote the words, "Refused. W. I. Grubb, Judge," to which said refusal by the Court, of said charge, the defendant then and there in open court, duly and legally excepted, the said charge being as follows:

"(1) If the jury believe the evidence your verdict must be for the defendant."

Thereafter, on the 22nd day of March, 1924, the defendant duly presented to the Court its motion for a new trial, upon substantially the same grounds shown by the assignments of error filed in this cause by the defendant (plaintiff in error), which said motion was by the court overruled on the 22nd day of March, 1924. As a part of the order of the Court overruling and denying the motion for new trial, it was also ordered by the Court that the defendant should be, and it was thereby allowed until May 26th, 1924, within which to present its bill of exceptions and sue out a writ of error in said cause.

[fol. 61] ORDER SETTLING BILL OF EXCEPTIONS

The foregoing is accordingly presented by the defendant and signed as a proper bill of exceptions in said cause, and ordered to be filed as part of the record herein within the time fixed by law and the rules and practice of this Court.

This 19th day of May, 1924.

W. I. Grubb, U. S. District Judge.

O. K. by G. R. Harsh.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed May 19, 1924

And now comes St. Louis-San Francisco Railway Company, defendant herein, and says that on the 12th day of March, 1924, this Court entered a judgment herein in favor of the plaintiff and against the defendant, on the verdict of the jury trying the said cause, in the sum of thirteen thousand seven — and fifty dollars ($13,750), in which judgment and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignments of error which are filed with this petition.

Wherefore, this defendant prays, that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the [fol. 63] Fifth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

Cabaniss, Johnston, Cocke & Cabaniss, Attorneys for Defendant.

Presented this 19th day of May, 1924.

W. I. Grubb, United States District Judge.

In United States District Court

[Title omitted]

Assignments of Error—Filed May 19, 1924

The defendant in this action, in connection with its petition for a writ of error, makes the following assignments of error, which it avers occurred upon the trial of the cause, to-wit:

(1) The Court erred in overruling the objection of the defendant to the following question asked the plaintiff's witness L. L. Jenkins, on the direct examination:

[fol. 64] "Q. About how many men were there on strike at that time, if you have any idea; were there considerable or few?"

(2) The Court erred in overruling the objection of the defendant to the following question asked the plaintiff's witness L. L. Jenkins, on the direct examination:

"Q. Well, did you report that to the Company?"

(3) The Court erred in overruling the objection of the defendant to the following question asked the plaintiff's witness A. D. Weathers, on the direct examination:

"Q. Describe as best you can, how he acted as guard?"

(4) The Court erred in overruling the objection of the defendant to the following question asked the plaintiff's witness A. D. Weathers, on the direct examination:

"Q. Well, what was said by him in the presence of Mr. Mills?"

(5) The Court erred in overruling the objection of the defendant to the following question asked the plaintiff's witness A. D. Weathers, on direct examination:

"Q. And what did he say?"

(6) The Court erred in the following portion of its oral charge to the jury:

(a) "So the first question is to determine whether Mr. Mills was an employee of a kind that could have brought a suit, had he lived, under the Employers' Liability Act. If he was, then, of course, his administratrix could bring a suit for his death."

[fol. 65] (7) The Court erred in the following portion of its oral charge to the jury:

(b) "Now, of course, there would have to be shown a duty on the part of the company to take care of him beyond his place of

work and to his home in order that he remain an interstate employee when he was shot."

(8) The Court erred in the following portion of its oral charge to the jury:

(e) "And you would have to find that in this case in order to put him in the status of one who had a right to sue under this act, he would have had to remain an employee, not only on the company's premises, but at the time of the shooting, that is, on his way home, and, therefore, until he got home, in order that he be entitled, or that his administratrix be entitled to sue under this act."

(9) The Court erred in the following portion of its oral charge to the jury:

(d) "That is to say, if there were a duty that attended him while he was on his way home on the part of the company to protect him and to give him protection, then a violation of that duty would be a violation of a duty to an interstate employee while he was on his way home from doing interstate work at the company's premises."

(10) The Court erred in the following portion of its oral charge to the jury:

(e) "Now, it is for you to say whether he was an employee in the sense that he was engaged in interstate commerce or employed [fol. 66] in interstate commerce at the time of his death, depending, as I say, on whether or not he did work before he left the yards inspecting interstate trains; second, whether he was protected by employment or custom that existed in this case that he was to be protected beyond the limits of the company's property and to his home."

(11) The Court erred in the following portion of its oral charge to the jury:

(f) "If you find those two things, then you have a right to say that he was an interstate commerce employee at the time he was shot."

(12) The Court erred in the following portion of its oral charge to the jury:

(g) "The next proposition is whether there was any negligence on the part of the company that he could complain of as an employee under the Federal Employers' Liability Act."

(13) The Court erred in the following portion of its oral charge to the jury:

(h) "Therefore, your first inquiry on this would be whether there was any duty on the part of the railroad company to protect him against assault from strikers at the time he was hurt."

(14) The Court erred in the following portion of its oral charge to the jury:

(i) "Of course, that rule could be modified by a contract made between him and the company that they would protect him or give him protection, not only while he was on their premises, but while [fol. 67] he was going to and fro between their premises and his home."

(15) The Court erred in the following portion of its oral charge to the jury:

(j) "So it is that if, by custom, they had been furnishing protection for such length of time as would induce employees to believe that employees would be protected and they would undertake to furnish protection, then it would be a question of fact for you to determine, not me, whether out of that custom a duty would or would not spring up to furnish protection, not only on the premises, but on the journey of the man to his home."

(16) The Court erred in the following portion of its oral charge to the jury:

(k) "That is to say, if for some length of time they had been in the habit of furnishing guards to take the men to their homes, and the men had been working under that custom, undertaking a surety, then it would be a question of fact whether a duty arose from those acts on the part of the company to continue to furnish guards on any particular trip."

(17) The Court erred in the following portion of its oral charge to the jury:

(l) "You must find there was a duty in order to predicate negligence."

(18) The Court erred in the following portion of its oral charge to the jury:

(m) "Now, the other contention of the plaintiff is this: She says [fol. 68] that there was an inefficient guard, in numbers, furnished the decedent, Mr. Mills, and that that was negligence, and that if there had been a sufficient guard, in numbers, furnished, the assault would have been prevented by the presence of more guards and the plaintiff's intestate would not have been killed."

(19) The Court erred in the following portion of its oral charge to the jury:

(n) "Now, in this case it seems to me your attention should be converged on what Wilkins did, because, as I understand, the railway company itself had guards around and could not be charged with negligence in not furnishing sufficient guards at East Thomas."

(20) The Court erred in the following portion of its oral charge to the jury:

(o) "The question would be, it seems to me, whether Wilkins, under the circumstances sent enough guards with these two men, Weathers and Mills."

(21) The Court erred in the following portion of its oral charge to the jury:

(p) "Now, the question is whether you believe that a reasonably prudent man would have anticipated danger, if you believe that those things were told to Wilkins, from the reports that were made to him, were of such a character that would have made a reasonably prudent man have reinforced the guard and send the guards with them: * * *."

(22) The Court erred in the following portion of its oral charge to the jury:

[fol. 69] (q) "On the other hand, if you believe the reports were made as stated by Mr. Weathers, and if you believe from all the circumstances and the situation of the strike, a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he would have sent more guards than one guard, then the failure to send more guards than one guard, you might say was—you might find was negligence on the part of Wilkins. It is for you to say whether it was or not."

(23) The Court erred in the following portion of its oral charge to the jury:

(r) "On the other hand, if you are reasonably satisfied that there was a departure from due care on the part of Wilkins, and that he was guilty of negligence in not sending more guards along with Weathers and with Mills, and you find that to be negligence on his part."

(24) The Court erred in the following portion of its oral charge to the jury:

(s) "Then you would next inquire whether it was a cause or proximate cause of the plaintiff's intestate's death."

(25) The Court erred in the following portion of its oral charge to the jury:

(t) "If you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also find that a greater guard should have been furnished in the exercise of due care, then, then that would show that that was the causal relation in the failure to furnish it and the accident resulting in the death of the intestate."

[fol. 70] (26) The Court erred in refusing to give at the request of the defendant, the following written charge:

"(1) If the jury believe the evidence, your verdict must be for the defendant."

Wherefore, the defendant prays, that the judgment of the District Court may be reversed.

Cabaniss, Johnston, Cocke & Cabaniss, Attorneys for Defendant.

Presented this 19th day of May, 1924, with petition for writ of error.

W. I. Grubb, United States District Judge.

In United States District Court.

[Title omitted]

Order Allowing Writ of Error—Filed May 19, 1924

This 19th day of May, 1924, came the defendant by its attorneys, and filed herein and presented to the Court its petition praying for [fol. 71] the allowance of a writ of error, and the assignments of error intended to be urged by it, praying also that a transcript of the record, proceedings, and the papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, and that such other and further proceedings be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error, upon the defendant giving bond according to law, in the sum of eighteen thousand dollars ($18,000), which shall operate as a supersedeas bond.

W. I. Grubb, United States District Judge.

[fols. 72 & 73] Bond on Writ of Error for $18,000—Approved and filed May 19, 1924; omitted in printing

[fol. 74] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Fifth Judical Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Odell Mills, as Administratrix of the estate of Ira S. Mills, Deceased, and St. Louis-San Francisco Railway Company a manifest error hath happened, to the great damage of the said St. Louis-San Francisco Railway Company as by its complaint appears We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be [fol. 75] done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 19 day of May, in the year of our Lord one thousand nine hundred and twenty-four.

Chas. J. Allison, Clerk of the U. S. District Court, Northern District of Alabama. (Seal.)

Allowed by W. I. Grubb, Judge of the United States District Court, Northern District of Alabama.

[fol. 76] CITATION—In usual form, showing service on Harsh, Harsh & Harsh et al.; omitted in printing

[fol. 77] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Northern District of Alabama:

I, Chas. J. Allison, Clerk of the District Court of the United States for the Northern District of Alabama, Southern Division, do hereby certify that the foregoing pages numbered from one (1) to seventy-six (76), both inclusive, is a full, true and correct transcript of the record in the matter of St. Louis-San Francisco Railway Company, a corporation, plaintiff in error, vs. Odell Mills, as Administratrix of Estate of Ira S. Mills, Deceased, defendant in error, as fully as the same appears of record and on file in my office.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of said Court on this the 9 day of June, A. D. 1924.

Chas. J. Allison, Clerk United States Court, Northern District of Alabama.

[fol. 78] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4366

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

versus

ODELL MILLS, as Administratrix of Estate of Ira S. Mills, Deceased

ARGUMENT AND SUBMISSION

On this day this cause was called, and, after argument by W. R. C. Cocke, Esq., for plaintiff in error, and G. R. Harsh, Esq., for defendant in error, was submitted to the Court.

[fol. 79] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

W. R. C. Cocke, (Cabaniss, Johnston, Cocke & Cabaniss, and W. R. C. Cocke on the brief), for Plaintiff in Error.

G. R. Harsh, (Harsh, Harsh & Harsh on the brief), for Defendant in Error.

Before Walker and Bryan, Circuit Judges, and Estes, District Judge

OPINION—Filed December 17, 1924

WALKER, Circuit Judge:

This was an action under the Federal Employers' Liability Act to recover damages for the death of Ira S. Mills, an employee of the

plaintiff in error, a railway company, the death of the employee being attributed to negligence chargeable against his employer. In the trial there was evidence to the following effect: The employee entered the service of the employer on the Monday next preceding the Thursday night when he was shot, as stated below. His work was [fol. 80] that of a car inspector at the employer's East Thomas Yards, in Birmingham, Alabama, and included the inspection of both intrastate and interstate trains. Prior to and at the time the employee entered upon his service and while he was engaged therein, a strike of the employer's former employees was in progress, and during all that time the employer furnished guards to guard the men who took the places of the strikers, the men being guarded while they were coming from their places of residence to their place of work, while they were at work, and while they were returning to their places of residence. Between ten and eleven o'clock Thursday night the employee and another car inspector got through inspecting a train that was going to Amory, Mississippi. They did no work after inspecting that train except to put in their proper place the lanterns and other articles they had been using, and make and turn into the office their reports. Soon thereafter the two car inspectors, accompanied by a guard who had been assigned to take them to their homes in the City of Birmingham, left the yards, walked a distance of about a half a mile to where they were to take a street car, and got on a car at that place. Soon after they got on the car one of several men who were on the rear platform came into the car, put his hand on the shoulder of Weathers, one of the two car inspectors, and, with an oath, told him to get off. About that time several shots were fired from the rear platform, some of which struck Mills, and he died from the wounds the next day. Prior to the shooting threats of personal violence to the men who were working were made by strikers, and the fact that such threats were made was reported to the employer's employee Wilkins, who was in charge or command of the guards. The assign- [fol. 81] ment of a guard to take the two car inspectors to their homes was made by Wilkins, the boss of the guards, after such boss had been informed during the same Thursday that the person so assigned, while acting as a guard, had been nervous and scared when there were some pickets near the place where an employee he was guarding was at work, and had left the employee he was guarding and gone back to the employer's office. When that guard got on the street car with the two car inspectors the butt of his pistol was showing from under his coat. One of the men who did the shooting looked at the guard and at the butt of his pistol, and at one of his companions, and laughed.

The court's charge to the jury contained instructions to the following effect: If there was a duty on the employer to furnish protection to the employee while he was on his way home from doing interstate work on the employer's premises a violation of that duty would be a violation of the employer's duty to an interstate employee. If by custom the employer had been furnishing protection to its employees for such length of time as would induce the em-

ployees to believe that they would be protected, then it would be a question of fact for the jury to determine whether out of that custom or habit a duty would or would not spring up to furnish protection, not only on the employer's premises, but on the journey of the employee to his home. If you believe that the reports testified to were made to Wilkins, and that those reports were of such a character as would have made a reasonably prudent man reinforce the guard, and if you believe from all the circumstances and situation of the strike, that a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he would have sent more guards than one, then you might find that there was negli- [fol. 82] gence on the part of Wilkins. If you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also find that a greater guard should have been furnished in the exercise of due care, then that could show that there was a causal relation between the failure to furnish a greater guard and the accident resulting in the death of the intestate. The court refused to give the following charge requested by the defendant: "If the jury believe the evidence your verdict must be for the defendant." The above mentioned rulings are presented for review.

The employee's day's work being in both intrastate and interstate commerce, while, after finishing his day's work, he was making a trip which was a necessary incident of that work as a whole, he was employed in interstate commerce. Erie R. R. Co. v. Winfield, 244 U. S. 170. Though when the employee was shot he had left his employer's premises and was on a vehicle operated by a third party, it fairly may be said that he was still an employee if the trip he was making was in immediate connection with his employment, and during that trip the employer owed him a duty, the performance of which was part of the consideration by which he was induced to enter upon and continue in the employment. Wilson v. Banner Lumber Co., 32 So. 460; Doyle v. Fitchburg R. Co., 25 L. R. A. 157. The evidence as to the circumstances under which the employee entered upon and remained in the employer's service furnished support for an inference that the employer's undertaking to furnish the employee protection during the trip from his home to the place of work and from the place of work back to his home was part of the consideration moving to the employee for the service he rendered. [fol. 83] It might be inferred that such protection had to be furnished to obtain labor at the place needed, and that the relation of employer and employee still continued while the employee was on his way from his place of work to his home accompanied by a guard furnished by the employer pursuant to an implied obligation to protect the employee from perils to which he was exposed in consequence of his employment. There was evidence furnishing support for a finding that there was negligence in the matter of having the employee guarded while he was returning to his home.

In behalf of the employer it is contended that, though it negligently failed to comply with an obligation it incurred to furnish the employee protection from threatened acts of violence by strikers

or their sympathizers which, under the circumstances, might reasonably have been anticipated, that negligence was not a proximate cause of the employee's death, because his death would not have occurred but for the supervening of an independent and disconnected agency. Negligence properly may be regarded as the proximate cause of an injury if it appears that the injury was the natural and probable consequence of the negligence, and that in the light of the attending circumstances it ought to have been foreseen by the wrongdoer. A careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. Milwaukee, etc., Railway Co. v. Kellogg, 94 U. S. 469; Atchison etc. Railway Co. [fol. 84] v. Stone, 213 U. S. 1, 9; Delaware & Hudson Co. v. Ketz, 233 Fed. 31. If the employer negligently failed to perform a duty incurred by it to protect the deceased from assault or personal violence while on the trip from his place of work to his home, and if in the circumstances of that misconduct a natural and probable consequence of it was a reasonably avoidable exposure of the deceased to personal violence during that trip, and in the light of those circumstances the employer ought to have foreseen that such misconduct on its part was calculated to invite or induce the peril to the deceased which resulted in his injury and death, the fact that the source of that peril was an independent agency would not keep the deceased's death from properly being held to be the result of his employer's negligence. Evidence adduced was such as to warrant the submission to the jury under appropriate instructions of the questions whether the employee was or was not under a duty to guard the employee while the latter was returning from his place of work to his home, whether the employer did or did not negligently fail to perform that duty, and whether, if it was negligent in that regard, its negligence did or did not occur under such circumstances as to make the death of the employee in the way it occurred a result of that negligence.

We conclude that the court did not err in refusing to give the above set out charge requested by the defendant, or in its instructions to the jury as to questions raised by the pleadings and evidence in the case.

The judgment is affirmed.

[fol. 85] In United States Circuit Court of Appeals

[Title omitted]

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the St. Louis-San Francisco Railway Company, and the surety on the writ of error bond herein, United States Fidelity & Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 86] In United States Circuit Court of Appeals

Clerk's Certificate

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered from 78 to 85 next preceeding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered 4366, wherein St. Louis-San Francisco Railway Company is plaintiff in error and Odell Mills, as Administratrix of the Estate of Ira S. Mills, Deceased, is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 77 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 31st day of December, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 87] Supreme Court of the United States

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

Order Granting Petition for Certiorari—March 9, 1925

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fifth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

No. [redacted] 264

Office Supreme Court, U.
FILED
JAN 31 1925
WM. R. STANSBU
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,
Petitioner,

vs.

ODELL MILLS, AS ADMINISTRATRIX OF THE ESTATE OF IRA S. MILLS, DECEASED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,
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vs.

ODELL MILLS, AS ADMINISTRATRIX OF THE ESTATE OF IRA S. MILLS, DECEASED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES CIRCUIT COURT OF APPEALS

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petitioner, St. Louis-San Francisco Railway Company, respectfully shows to the Court as follows:

(1) This action, in which judgment was rendered against petitioner for $13,750 in the District Court of the United States for the Southern Division of the Northern District of Alabama, was brought under the

Federal Employers Liability Act to recover damages of the defendant railway company, the petitioner here, for the death of Ira S. Mills who, during the shopmens' strike on the railroads in August, 1922, while returning from work after having terminated his hours of service for the day and while on a public street car in the city of Birmingham, Alabama, was shot to death by strikers.

Mills, the decedent, was employed by petitoner (hereinafter referred to as defendant) as a car repairer during the strike in the summer of 1922. On the night of August 3rd after he had completed his work in the defendant's yards at Birmingham, had gone off duty and was returning home on one of the street cars of the Birmingham Railway, Light & Power Company, he was shot to death by unidentified strikers who opened fire without warning from the rear platform of the street car upon Mills, and upon Weathers, a companion car repairer, and Cantrell, a deputy sheriff employed by the defendant who was guarding the two men from work to their homes.

The theory of liability which the trial court submitted to the jury and which the Circuit Court of Appeals sustained on the appeal of the defendant railway company from the judgment that ensued was: (1) Even though Mills had completed his entire work, had left the premises of the defendant and was on his way home in a public conveyance he was still "employed in interstate commerce" within the meaning of the Federal Act; and (2) while so employed, the defendant could, as the jury was allowed to find, have been guilty of a negligent failure to furnish greater protection to Mills in the form of a stronger guard which might, by a greater display of force, have deterred the murderers from accomplishing, or attempting to accomplish, the murder.

The idea that defendant may have rested under a duty to furnish a stronger guard for Mills and his companion Weathers was predicated upon testimony given by Weathers that threats had been made by strikers against him, Weathers, information as to these threats given by Weathers to Wilkins, the man in charge of the deputies guarding the yards, and some slender and indefinite testimony tending to show cowardice on the part of Cantrell, the guard, in the face of strikers on other occasions.

The trial court, however, expressly declined to submit to the jury any question as to whether on the occasion of the murder, Cantrell was guilty of negligence or cowardice proximately inducing the shooting.

That one of the last tasks performed by Mills before he left the yards was connected with interstate commerce is conceded, but it was and is the contention of petitioner that upon the cessation of that task, and an hour later, of Mills' duties for the night, all possible connection with interstate commerce came definitely to an end; that the relatonship of master and servant between the defendant and Mills did not continue during the time of the journey on the street car and that at the time of the murder there was no possible employment in interstate commerce, so as to furnish the basis for a cause of action under the Federal Act.

The theories of liability were elaborated by the trial court in the oral charge to which the defendant reserved numerous exceptions, and by the court's refusal of the defendant's requested instruction directing a verdict in its favor.

The evidence (Record pp. 32, 33) showed that the last work in interstate commerce done by Mills was the inspection of an interstate train about ten o'clock. There-

after Mills and Weathers took their tools back to the yard office, turned in their report, washed up and at fifteen minutes past eleven left the yards with Cantrell, the guard. They walked some distance, took the street car, and shortly thereafter one of three strikers on the back platform of the street car attempted to force Weathers to leave the car as it stopped to take on a passenger. When Weathers resisted the strikers commenced shooting into the car and Mills was mortally wounded.

Upon the foregoing undisputed facts it was and is the contention of petitioner:

(1) That Mills was not, at the time of the shooting, employed in interstate commerce;

(2) That petitioner rested under no duty to provide Mills with a heavier guard than it did;

(3) That it is wholly a matter of speculation and conjecture whether the shooting would have been averted, even if a heavier guard had been furnished;

(4) That irrespective of any question of negligent failure of the petitioner in that particular, the immedate proximate cause of the death of Mills was the intervening wrongful act of the strikers for which petitioner was in no way responsible.

The following portions of the oral charge of the District Judge, to which the defendant reserved appropriate exceptions, show the theory upon which the case was submitted to the jury:

> (a) "So the first question is to determine whether Mr. Mills was an employee of a kind that could have brought a suit, had he lived, under the Federal Employers' Liability Act. If he was, then, of course, his administratrix could bring a suit for his death.

(b) "Now, of course, there would have to be shown a duty on the part of the company to take care of him beyond his place of work and to his home in order that he remain an interstate employee when he was shot.

(c) "And you would have to find that in this case in order to put him in the status of one who had a right to sue under this act, and he would have had to remain an employee, not only on the company's premises, but at the time of the shooting, that is, on his way home, and, therefore, until he got home, in order that he be entitled, or that his administratrix be entitled to sue under this act.

(d) "That is to say, if there was a duty that attended while he was on his way home on the part of the company to protect him and to give him protection then a violation of that duty would be a violation of a duty to an interstate employee while he was on his way home from doing interstate work at the company's premises.

(e) "Now, it is for you to say whether he was an employee in the sense that he was engaged in interstate commerce, or employed in interstate commerce at the time of his death, depending, as I say, on whether or not he did work before he left the yards inspecting interstate trains; second, whether he was protected by employment or custom that existed in this case that he was to be protected beyond the company's property and to his home.

(f) "If you find those two things, then you have a right to say that he was an interstate commerce employee at the time he was shot.

(g) "The next proposition is whether there was any negligence on the part of the company

that he could complain of as an employee under the Federal Employers' Liability Act.

(h) "Therefore, your first inquiry on this would be whether there was any duty on the part of the railroad company to protect him against assault from strikers at the time he was hurt.

(i) "Of course, that rule could be modified by a contract made between him and the company that they would protect him or give him protection not only while he was on their premises, but while he was going to and fro between their premises and home.

(j) "So it is that if, by custom, they had been furnishing protection for such length of time as would induce employees to believe that employees would be protected and they would undertake to furnish protection, then it would be a question of fact for you to determine, not me, whether out of that custom a duty would or would not spring up to furnish protection, not only on the premises, but on the journey of the man to his home.

(k) "That is to say, if for some length of time they had been in the habit of furnishing guards to take the men to their homes, and the men had been working under that custom, undertaking a surety, then it would be a question of fact whether a duty arose from those acts on the part of the company to continue to furnish guards on any particular trip.

(l) "You must find there was a duty in order to predicate negligence.

(m) "Now, the contention of the plaintiff is this: She says that there was an inefficient guard, in numbers, furnished the decedent, Mr. Mills, and that there was negligence, and that if

there had been a sufficient guard, in numbers, furnshed, the assault would have been prevented by the presence of more guards and the plaintiff's intestate would not have been killed.

(n) "Now, in this case it seems to me your attention should be converged on what Wilkins did, because, as I understand, the railway company itself had guards around and could not be charged with negligence in not furnishing sufficient guards at East Thomas.

(o) "The question would be, it seems to me, whether Wilkins under the circumstances sent enough gards with these two men, Weathers and Mills.

(p) "Now, the question is whether you believe that a reasonably prudent man would have anticipated danger, if you believe that those things were told to Wilkins, from the reports that were made to him, were of such a character that would have made a reasonably prudent man have reinforced the guard and send the guards with them.

(q) "On the other hand, if you believe the reports were made as stated by Mr. Weathers, and if you believe from all the circumstances and the situation of the strike, a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he would have sent more guards than one guard, then that failure to send more guards than one guard, you might say was—you might find negligence on the part of Wilkins. It is for you to say whether it was or not.

(r) "On the other hand, if you are reasonably satisfied that there was a departure from due care on the part of Wilkins, and that he was guilty of negligence in not sending more guards along with Weathers and with Mills, and you find that to be negligence on his part, * * *

(s) "Then you would next inquire whether it was a cause or proximate cause of the plaintiff's intestate's death.

(t) "If you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also find that a greater guard should have been furnished in the exercise of due care, then, then that would show that that was the causal relation in the failure to furnish it and the accident resulting in the death of the intestate."

The Circuit Court of Appeals in affirming the judgment by its opinion handed down on the 17th day of December, 1924, held:

"The employee's day's work being in both intrastate and interstate commerce, while, after finishing his day's work, he was making a trip which was a necessary incident of that work as a whole, he was employed in interstate commerce. *Erie R. R. Co. v. Winfield,* 244 U. S. 170. Though when the employee was shot he had left the employer's premises and was on a vehicle operated by a third party, it fairly may be said that he was still an employee if the trip he was making was in immediate connection with his employment, and during that trip the employer owed him a duty, the performance of which was part of the consideration by which he was induced to enter upon and continue the employment. *Wilson v. Bonner Lumber Co.,* 32 So. 460; *Doyle v. Fitchburg R. Co.,* 25 L. R. A. 157. The evidence as to the circumstances under which the employee entered upon and remained in the employer's service furnished support for an inference that the employer's undertaking to furnish the employee protection during the trip from his home to the place of work

and from the place of work back to his home was part of the consideration moving to the employee for the service he rendered. It might be inferred that such protection had to be furnished to obtain labor at the place needed, and that the relation of employer and employee still continued while the employee was on his way from his place of work to his home accompanied by a guard furnished by the employer pursuant to an implied obligation to protect the employee from perils to which he was exposed in consequence of his employment. There was evidence furnishing support for a finding that there was negligence in the matter of having the employee guarded while he was returning to his home."

As to the question of proximate cause the Court of Appeals said:

"Negligence properly may be regarded as the proximate consequence of an injury if it appears that the injury was the *natural* and *probable* consequence of the negligence, and that in the light of the attending circumstances it ought to have been foreseen by the wrongdoer. A careless person is liable for all the *natural* and *probable* consequences of his misconduct. If the misconduct is of a character which according to the usual experience of mankind is calculated to *invite* or *induce* the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. *Milwaukee, etc., Railway Co. v. Stone*, 213 U. S. 1, 9; *Delaware & Hudson Co. v. Ketz*, 233 Fed. 31. If the employer negligently failed to perform a duty incurred by it to protect the deceased from assault or personal violence while on the trip from

his place of work to his home, and if in the circumstances of that misconduct a natural and probable consequence of it was a reasonably avoidable exposure of the deceased to personal violence during that trip, and in the light of those circumstances the employer ought to have foreseen that such misconduct on its part was calculated to invite or induce peril to the deceased which resulted in his injury and death, the fact that the source of that peril was an independent agency would not keep the deceased's death from properly being held to be the result of his employer's negligence." (Italics ours.)

Petitioner respectfully asserts that upon each of the two vital issues in the case the foregoing conclusions of the Circuit Court of Appeals are erroneous; that the judgment of the said Court of Appeals was in error and that said Court should have reversed the judgment and remanded the cause to the District Court.

Petitioner files and presents as an exhibit hereto a certified copy of the entire transcript of the record in the case, including the proceedings in the Circuit Court of Appeals.

The review of this cause by certiorari to the said Circuit Court of Appeals is of general and peculiar importance for the reason that the opinion of the Circuit Court of Appeals announces:

(1) A radical extension of the scope of the Federal Employers Liability Act in two vital particulars since it holds: (a) That the relationship of employer and employee exists even though the employee has terminated his work and is on his way home on a vehicle not under the control of the employer and while the employee though under the protection voluntarily

afforded by the employer, is no longer in any sense under the employer's domination or control; (b) That the voluntary act of the employer in affording an employee protection from violence immediately becomes transmuted into a legal duty resulting from the contract of employment which the employer must perform in such a way as to insure the safety of the employee.

(2) A novel and unsound extension of the theory of proximate cause in its relation to an independent, intervening criminal act that actually and directly resulted in the death of Mills in holding: (a) That the shooting of Mills on a public conveyance in the presence of the car crew and other passengers was a "natural and probable consequence" of the failure of the defendant to furnish a heavier guard, and one which the defendant could reasonably have anticipated; (b) That the supposed negligence of the defendant invited and induced the shooting.

The theory as to proximate cause announced by the Circuit Court of Appeals is an unsound and erroneous application of the language of the opinion of this court in the leading case of *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, which invoked a principle of the law of proximate cause wholly inapplicable to the case at bar.

Following this petition is a brief in support thereof.

Your petitioner prays that a writ of certiorari be issued out of and under the seal of this court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings

of said Circuit Court of Appeals in this cause which was entitled in that court, to the end that said cause may be reviewed and determined by this Court as provided by law, and that upon such review this Court order a reversal of the judgment of the District Court of the United States for the Southern Division of the Northern District of Alabama and a new trial of this cause, and that the judgment of the Circuit Court of Appeals may be reversed.

Tomey Johnston
Attorney for Petitioner.

THE STATE OF ALABAMA,
JEFFERSON COUNTY.

W. C. Dalrymple, being first duly sworn, on his oath deposes and says, that he is an agent for St. Louis-San Francisco Railway Company, a corporation, the petitioner named in the foregoing petition, duly authorized to excute this affidavit on its behalf, and that the same is true, as affiant verily believes.

W. C. Dalrymple

Subscribed and sworn to before me this 26 day of January, 1925.

D Ebode
Notary Public,
Jefferson County, Alabama

To HARSH, HARSH & HARSH, Attorneys for Odell Mills, Administratrix of the Estate of Ira S. Mills, deceased:

Take notice that the foregoing petition will be submitted to the Supreme Court of the United States for a

writ of certiorari as therein prayed for at the opening of court on Monday, the 9th day of February, 1925.

Attorneys for Petitioner.

Service of notice of said notice of said date of submission of the foregoing petition and a copy of said petition, together with a copy of the brief following in support thereof is accepted on this_____day of January, 1925.

Attorneys for Respondent Odell Mills, as Administratrix of the Estate of Ira S. Mills, deceased.

BRIEF IN SUPPORT OF THE FOREGOING PETITION

The foregoing petition contains a summary statement of the case and of the reasons relied upon for the allowance of the writ. Further repetition is unnecessary but reference in the following argument is made from time to time to the testimony as shown by the record in connection with the contention that the District Court erred in the theories of liability submitted to the jury and in refusing to direct a verdict for the defendant.

ARGUMENT

I.

Mills Not Employed in Interstate Commerce

While it is true that one of the last duties performed by Mills before leaving the yards at East Thomas was that of an interstate employee, it is submitted that there is no basis, either in law, or in fact, for holding that it was for the jury to decide that the interstate status of Mills remained with him until the time of his death. As a matter of fact he remained, according to the undisputed testimony, in the yards for some time after completing his last interstate service in connection with the train to Amory.

His duties to the company, and his hours of service under his employment terminated when he left the yards at East Thomas. Thereafter, the protection which the defendant sought to accord Mills, while of course given in part in its own interest, had no relation to any former interstate status of Mills.

It is true that a number of cases have held that an employee stills retains that relationship to the employer, either while on the premises of the employer or riding to or from work free, on a conveyance furnished by the employer, but in an elaborate analysis of that line of decisions, Labatt says (Vol. 4, p. 4674):

> "The decisions reviewed in the preceding sub-section are referable to the conception that the master retains the right to control the servant while he is on the vehicle and that this right, although ordinarily dormant during the period of transportation, is susceptible of being at any moment called into active operation."

In the present record there is absolutely nothing to indicate that the work of Mills for the night, and any control of his future action by the defendant, had not definitely ended. Again, it is said by Labatt (Vol. 4, p.

4679), in referring to those cases holding that the servant could not recover because of the negligence of a fellow servant:

> "Both on principle and authority it is clear that the defense of common employment is not available to the master where the injured person was traveling entirely for his own purposes and the right of the master to exact the performance of services was not merely dormant but wholly suspended."

The test of whether there is an interstate relationship has been repeatedly stated by this court, and in no decision more clearly than in *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051. There, it was contended for the plaintiff that although at the moment of the injury the plaintiff was engaged in an intrastate movement, he would immediately afterward have become engaged in interstate commerce. The court said:

> "That he was expected upon the completion of that task to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

And in *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319, it was held that a yard conductor on an interstate railway injured while alighting from a slowly moving freight engine, for the purpose of reporting to the yardmaster's office for further orders, having executed all previous orders, was not an employee in interstate commerce, although the orders which he would have received had he not been injured would have required him immediately to make up an interstate train. The court said:

> "It was in evidence also that the orders plaintiff would have received had he not been injured on his way to the yard office would have required him immediately to make up an interstate train. Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion this view is untenable. By the terms of the Employers' Liability Act the proper test is the naature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act."

The following language from the opinion in *Minneapolis, etc., R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358, is in point, where the court, holding that the mere expectation that an engine when repaired would be employed in interstate commerce was not sufficient to create an instrumentality of commerce at the time of the injury, said:

> "It simply had finished some interstate work and had not yet begun upon any other. Its next work so far as appears might be interstate or confined to Iowa as it might happen. *At the moment it was not engaged in either.* Its character as an instrument of commerce depended upon its employment *at the time*, not upon remote probabilities or accidental later events." (Italics ours.)

And in *So. Ry. Co. v. Puckett*, 244 U. S. 571, 61 L. Ed. 1321, the court, in deciding the question whether at the time of the injury an employee was engaged in interstate commerce, said:

> "Of course we attribute no significance to the fact that the plaintiff had been inspecting interstate commerce before he was called aside by the occurrence of the collision."

And in *So. Ry Co. v. Pitchford*, 253 Fed. 736, the Circuit Court of Appeals for the Fourth Circuit observed:

> "It is immaterial that the plaintiff's last previous work may have been cleaning an interstate car, or that his next work would certainly have been icing an interstate car from the ice box."

The present case is obviously distinguishable from the decision of the *Supreme Court in Erie R. Co. v. Winfield*, 244 U. S. 170, 61 L. Ed. 1057, where an employee injured while in the act of leaving the yards after having been there employed in interstate commerce, was held to be entitled to sue under the act. For there, Winfield was still on the employer's premises, and under all the decisions entitled to the protection of the relationship while leaving the yards because the company owed him a duty to enable him to get beyond its premises without being exposed to the negligence of other employees. And the case at bar is obviously distinguishable from the situation presented in *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, where the deceased, a fireman, having just finished oiling his engine preparatory to going out on an interstate run, was killed while on his way to his boarding house just outside the yards, for some temporary purpose. The reason for the decision in the *Zachary* case was that there was no cessation of the interstate employment and that the mere temporary interruption of the actual work did not sever the interstate

relationship of the deceased to the defendant company. The present case is much more closely related to the principle that controlled the decision of the court in *Fletcher v. Baltimore & Ohio R. Co.*, 168 U. S. 135, 42 L. Ed. 411. There the plaintiff had finished his day's work in the defendant's shop, and while on his way home from work, while standing in a public street near one of the defendant's tracks, was struck by a missile thrown from one of the defendant's trains by one of its employees. Answering the contention that the plaintiff still occupied the relationship of an employee and could not recover because the injury resulted from an act of a fellow employee, the Court said:

> "The plaintiff at the time of the accident had finished his employment for the day and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have. The liability of defendant to plaintiff for the act in question is not to be guaged by the law applicable to fellow-servants. The facts existing at the time of the accident do not bring it within this rule."

In Volume 1, of Roberts, on Federal Liabilities of Carriers, a leading work on the Federal Employers' Liability Act, it is said in Section 58:

> "A common carrier by railroad is liable only to the servant when the latter is actually in the service, and the relationship does not exist where it appears that the performance of the work has been completed."

The definitions "employee" and "employed" were not intended to be changed in any way by the Federal Act.

> "In the Employers' Liability Act, Congress used the words 'employe' and 'employed' in their natural sense, and intended to describe the conventional relation of employer and employee."
>
> *Hull v. Phila. & R. R. Co.*, 252 U. S. 475; 64 L. Ed. 670.

So it has been held in the following cases that the injured man was not at the time of the injury employed in interstate commerce:

A conductor leaving his train at a station and having registered, and then boarded another train with the operation of which he had nothing to do, for the purpose of going home—*Dodge v. Chicago Great Western Ry. Co.*, 146 N. W. 14;

A car record clerk who, having finished the day's work and having turned in his reports, was killed while leaving the yards—*Jacoby v. Chicago, etc., R. Co.*, 161 N. W. 751;

An employee riding home in the employer's train, on a pass, after completing the day's work as fireman on an interstate train—*Knorr v. New Jersey Cent. R. Co.*, 110 Atl. 797 (Pa.).

In *Gray v. Chicago & N. W. R. Co.*, 142 N. W. 505 (Wis.), an engine hostler who worked indiscriminately on interstate and intrastate engines, was not while walking back to his shanty to await the coming of another locomotive, an employee during such period of idleness, in interstate commerce.

It is therefore submitted that on no theory can it be held that Mills was employed in interstate commerce at the time of his murder, and that the court erred in allowing the jury to find, not only that the relationship of master and servant existed between the defendant and

Mills, but that his interstate employment continued until the shooting.

If the theory of the trial court is sustained, then obviously the mere fact that the last task that an employee performs before definitely quitting work and terminating his hours of service, imparts to his entire subsequent relationship with the employer, and until the employee at some remote time performs an act connected with intrastate commerce, the status of an interstate employee.

Such a conclusion, we submit, violates the fundamental conception of the Federal Act, and necessarily results in an absorption into the field of interstate commerce of the entire relationship of the employee to the employer, at all times when the employee is not actually engaged in some specific act of *intrastate* commerce. Such a conception is entirely contrary to the test announced by the Supreme Court in numerous decisions in the form of this question:

> "Was the employee at the time of the injury employed in interstate transportation, or in a work so closely related to it as to be practically a part of it?"
>
> *Shanks v. Delaware L. & W. R. Co.*, 239 U. S. 566; 60 L. Ed. 436.

II.

The fact that the defendant furnished armed protection to its employees against strikers did not create a duty on its part to furnish at its peril such protection as would insure the employee against injury.

The reasoning of the Circuit Court of Appeals does not stand analysis. Citing the case of *Erie Railroad Co. v. Winfield, supra,* the opinion says:

> "Though when the employee was shot he had left his employer's premises and was on a vehicle operated by a third party, it fairly may be said that he was still an employee if the trip he was making was in immediate connection with that employment, and during that trip the employer owed him a duty, the performance of which was part of the consideration by which he was induced to enter upon and continue in the employment."

There is not a word of testimony in the record that any promise of protection was made by the railway company to Mills at the time he was employed, or that any such promise entered into the relationship.

Proceeding further the Court of Appeals said:

> "It might be inferred that such protection had to be furnished to obtain labor at the place needed, and that the relation of employer and employee still continued while the employee was on his way from his place of work to his home accompanied by a guard furnished by the employer pursuant to an implied obligation to protect the employee from perils to which he was exposed in consequence of his employment. There was evidence furnishing support for a finding that there was negligence in the matter of having the employee guarded while he was returning to his home."

The necessary hypothesis for any such conclusion is that the railway company had at its command unlimited forces and complete protection for Mills if it had chosen

to furnish it—a praetorian guard for each employee. If such had been the case on this and other railroads, violence on the part of strikers would have been impossible, yet it is a matter of common knowledge that in this particular strike as in many others, the utmost care consistent with any reasonable outlay for protection, failed in numberless instances to avert violence and blood shed.

In the last analysis the doctrine announced by the Court of Appeals makes the employer virtually an insurer, and in every case where a sudden and unexpected attack is committed, it becomes a question for the jury to determine whether more stringent precautions might have averted a murder—we say "might have" because no one man or twelve could say with any reasonable certainty whether or not the presence of three or four guards would surely have prevented the attack, launched from the rear platform of a street car from which the assailants immediately disappeared into the darkness.

It would seem that the least probable place where the defendant would naturally have anticipated such an occurrence as this was upon a public conveyance, carrying passengers other than Mills, Weathers and Cantrell, whose lives were necessarily endangered by the shooting.

We have been unable to find any decision either from the state or federal courts, in any case based on the Federal Employers' Liability Act, involving the duty of an employer to guard an employee against the acts of strikers, but the question has arisen in several cases under state compensation acts where the question directly presented was whether an injury to an employee from the acts of strikers was received in the course of his employment.

In *Lampert v. Seimons*, 139 N. E. 278, the New York Court of Appeals held that injuries to a department

head who continued to work during a strike of the employees, resulting in an assault by a striker while the employer was on his way to work, did not arise during the course of the employment.

The discussion of the applicable principle is so directly in point that we quote in full from the opinion:

> "Had there been no strike, Lampert's employment would have ended when he left the factory at 134 West Thirty-ninth Street. His work was indoor work as foreman of the operating room. There was no work for Lampert to do for his employer after he left the factory at night and before he reached there in the morning. Therefore, all the authorities agree that, while going to and from his work, Lampert, if injured, would not come under the Workmen's Compensation Law (Consol. Laws, c. 76), as such injury would not arise during the course of his employment. *Tallon v. Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327, 21 A. L. R. 1218; *Matter of Schultz v. Champion Welding & Manufacturing Co.*, 230 N. Y. 309, 130 N. E. 304; *Matter of Kowalek v. N. Y. Consol. R. R. Co.*, 229 N. Y. 489, 128 N. E. 888; *Matter of McInery v. Buffalo & S. R. Corp.*, 225 N. Y. 130, 130 N. E. 806; *Walters v. Stavely Coal & Iron Co., Ltd.*, 4 W. C. C. 303, House of Lords, 1911.
>
> "There is a line of cases which holds that an employee injured while on the streets or in a conveyance may recover compensation. There are cases where the nature of the claimant's work took him to and in the place where he was injured, and where at the time he was actually engaged in doing that for which he was paid (*Matter of Redner v. H. C. Faber & Son*, 223 N. Y. 379, 119 N. E. 842); also compensation has been allowed where the employee was

injured while travelling to and from his work in a conveyance furnished by the employer under the contract of employment and the necessities of the situation. (*Matter of Littler v. George A. Fuller Co.*, 223 N. Y. 369, 119 N. E. 554). In this case, however, Lampert was not doing work for his employer while going to and from his home, neither was he being transported in a conveyance furnished by and under the control of his master.

"The application of the rule which has been made by the court below would carry us very far afield. If, under ordinary circumstances and within the authorities first above cited, Lampert was not carrying on any work for which he was employed while going home or coming to the factory, what was there in the strike which could possibly change this fact? The strike could not extend the field of his employment or the limits of his occupation unless he were employed to do something in connection with the strike, which of course is not this case. That he was in danger on the streets because of the strike is beyond question, but the danger existed at all times, and not necessarily while Lampert was going to and from his work. He could have been assaulted by a striker on the streets while he was going from his home to the theatre or to a dance or other place of amusement. If the limits of his employment can be extended under such circumstances to cover the distance between his home and the factory, why cannot those limits also be extended to reach any place and any activity in which the workman may be after working beyond hours? The danger may exist in one place as well as another. The fact that the employer may have offered or ordered protection from strikers to the employee while he was upon the street and after the hours of his work

would not or could not change the nature of his work or the time of its commencement and completion. The statute says that an employee must be injured while in the course of his employment. In this case Lamper's employment ceased when he left the factory.

"The views which we here express have been the ruling in other jurisdictions where a similar state of facts has presented the same question. *Poulton v. Kelsall,* L. R. 2, K. B. (1912) 131; *Rourke's Case,* 237 Mass. 360, 129 N. E. 603, 13 A. L. R. 564. In both of these cases there was an agreement to protect the employee from violence."

In *Poulton v. Kelsall,* 2 K. B. 131, 81 J. K. B. 774, 106 L. T. 522, it was held that a storekeeper acting as a carter during a carter's strike, on terms that he should be compensated for any injury to him done by strikers, and who was assaulted by strikers in a public street while on his way home from work, was not injured during the course of his employment so as to be entitled to recover under the English Workmen's Compensation Act.

In *Medlin Milling Co. v. Boutwell,* 133 S. W. 178, the court observed that—

"It is not the legal duty of a master to protect the servant from unlawful assaults by strangers."

In *Rourke's Case,* 129 N. E. 603 (Mass.), it was held that an injury caused by assault of a striker upon the claimant on a public street was not received within the course of the employment of the assaulted person within the meaning of the Workmen's Compensation Act, where he had left his place of employment for the

day and was proceeding toward his boarding house, although because of a strike at the plant he was provided by the employer with a place to board and lodge, toward which he was proceeding accompanied by the master's superintendent, who had promised him protection. The court said:

> "Unless the incidents of employment be exceptional the relation between a master and his servant is suspended when the servant leaves the place of his actual employment at the close of his day's work to go to his home, and again becomes active when, after the interval of rest, the laborer puts himself in a position where he can do the work of his employment at the place where it is to be performed. *Langley v. Boston Elev. R. Co.*, 223 Mass. 492, 496, 112 N. E. 79
>
> "In the case at bar the day's work of the claimant came to an end when he dropped his tools, rang in his time, left the place of his employment, and entered upon the public highway. While not conclusive in the determination of the incidents of the employment, it is worthy of consideration that thereafter the employer under the contract of employment had no legal right to command the services of the claimant and he was under no duty of obedience thereto.
>
> "As bearing upon the question of the incidents of the employment, we can perceive no resemblance between a contract of protection against criminal acts of third persons who may seek to coerce a hostile employer to grant their demands through the intimidation of and assaults upon his servants and a contract of employment which has regard to conditions and circumstances which are the natural, and not abnormal, concomitants of the work to be per-

formed under the contract, for example, agreements for transportation, when the place of work is at a distance. *McGuirk v. Shattuck,* 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110; *Kilduff v. Boston Elev. Co.,* 195 Mass. 307, 9 L. R. A. (NS) 873, 81 N. E. 191; *Donovan's Case,* 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549. See *Harbroe's Case,* 223 Mass. 139, 142, L. R. A. 1916D, 933, 111 N. E. 709."

In *Roebuck v. A. T. & S. F. R. Co.,* 162 Pac. 1153, L. R. A. 1917E, 741, the action, brought under the Federal Act, was based upon the alleged negligent retention by the employer, of Megreta, a vicious employee, after warning to the employer of his propensities and the promise of protection to the deceased, who was thereafter shot and killed by Megreta. In holding that there was no liability, the court said:

"It is plain that it could not have been the intention of Congress to make the carrier liable for the injury or death of an employee occasioned by the act of a stranger. We are fully in harmony with the liberal interpretation of the Federal Employers' Liability Act by the Federal courts generally; but we cannot conceive it to have been the intention of Congress to impose upon the carrier duties and obligations save those of an employer; nor that it was the purpose to impose new obligations not usually imposed upon employers except as the law of master and servant is by the express terms of the act itself limited or restricted."

III.

The death of Mills resulted from an independent intervening cause not proximately related to any negligence of the defendant.

It is submitted that in the first place, and regardless of other controlling considerations, that it could not conceivably have been the duty of the defendant to assume that murder would be committed by strikers on a public conveyance. The opinion of the Circuit Court of Appeals, on the other hand, proceeds on the contrary hypothesis: that the jury could say that "the injury was the *natural* and *probable* consequence of the negligence, and in the light of attending circumstances ought to have been foreseen" by the defendant. And again, proceeding upon the same erroneous theory, it is said:

> "If the misconduct is of a character which according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him and the subsequent misconduct will be held to be the result of the original misconduct. *Milwaukee, etc., Railway Co. v. Kellogg,* 94 U. S. 469; *Atchison, etc., Ry. Co. v. Stone,* 213 U. S. 1, 9; *Delaware & Hudson Co. v. Ketz,* 233 Fed. 31."

This language illustrates the misconception of the law of proximate cause that led to the judgment and its affirmance. For to say that the murder was the *result,* the *natural and probable consequence,* reasonably to be expected by the defendant from its failure to furnish a stronger guard is to transmute a mere inactive condition into an active causative force, responsible for the killing.

Such an idea violates the principle announced in the *Kellogg* case, cited by the Court of Appeals. There it was said:

> "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did

> the facts constitute a succession of events so linked together as to make a natural whole; *or was there some new and independent cause intervening* between the wrong and the injury?" (Our italics.)

And this language, even stronger, from opinion in the *Kellogg* case:

> "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. *They are not* when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause."

Thus it appears that the Court of Appeals has misapplied the *Kellogg* case in a manner directly affecting a controlling question here.

Again, as the court said in *A. T. & S. F. Ry. Co. v. Calhoun*, 213 U. S. 1, 53 L. Ed. 671:

> "Where in the sequence of events between the original default and the final mischief, an entirely independent and unrelated cause intervenes and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause, and the other the remote cause."

The following language from Cooley on Torts, 2nd Ed., p. 23, appears in the opinion in the *Calhoun case*:

> "It is not only requisite that damage should be suffered, but that this damage should be the legitimate sequence of the thing amiss.

> The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded, and in the application of it the law rejects as not constituting the foundation for the action that damage if it does not flow proximately from the act complained of. The explanation of this maxim may be given thus. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause and refuse to trace it to that which was remote."

A careful analysis of the authorities discloses that the error of the Court of Appeals lies in the failure to distinguish between those cases in which the so-called intervening cause was one directly and obviously induced or put in operation as a result of the original negligence, and those cases where, as here, the intervening cause bore no relation whatever to the original negligence.

As in the *Kellogg* case, where the fire, negligently allowed to escape and set fire to a grain elevator was thence borne by the wind to the plaintiff's lumber and destroyed it.

For example, if one negligently leaves a dangerous explosive, attractive to children, in an unguarded place, and a child finding it, causes it to explode to the injury of a third person, the original negligence in leaving the explosive unguarded is obviously not insulated or turned aside by the act of the child. For there the negligence was such as to "invite or induce," to use the language of the Court of Appeals, an act by an irresponsible agent that directly put into destructive operation, the original

negligence. See the typical case of *Shroka v. Halliday*, L. R. A. 1918E, 688.

But the defendant in the case at bar did nothing. It was guilty, at worst, of allowing a condition to exist which may have rendered easier the commission of the murder—the operation of the independent, intervening cause.

This distinction is clearly recognized and applied in the decision in *Jarnagin v. Travellers Protective Assn.*, 133, 892, 68 L. R. A. 499. There the contention was made that the negligence of police officers in failing while they held the deceased under arrest, to prevent his murder by other persons, was the proximate cause of his death. But the Circuit Court of Appeals for the Sixth Circuit in an opinion concurred in by Judge Lurton, said:

> "The shots of his assailants were the direct and proximate cause and the failure of the officers to protect him was only a condition which may or may not have contributed to the result. It may have been easier to kill him because of the condition, but it was not the condition which killed him."

In the careful discussion of this question in the note to *Gilson v. Delaware, etc., Canal Co.*, 36 A. S. R. at p. 842, this rule is deduced:

> "As will be seen from the cases cited in the following paragraph, the courts, at least in this country, refuse to hold a tort feasor liable for the results of a subsequent act which is willfully wrong, unless that act was actually intended by him."

Following this the annotator citing the opinion of Justice Holmes says:

> "A very eminent judge thus states the principle governing these cases: 'Wrongful acts of independent third persons (not actually intended by the defendant), are not regarded in law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual.' *Burt v. Advertiser, etc., Co.*, 154 Mass. 238 (per Holmes, J.)"

This merely concurs in the familiar rule laid down in Wharton on Negligence, Sec. 134:

> "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? The question must be answered in the negative, for the general reason that causal connection between negligence and damages is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter (as to which I am not contractually bound). Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured."

No language could be more appropriate to the case at bar than the following excerpt from the opinion in *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216, 226:

"As has been said in an anonymous article in the American Law Review: 'A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible; it is one which can be used as a term by which a proposition can be demonstrated, that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between which and the effect is uncertain, vague, or indeterminate. It does not contain in itself the element of necessity between it and its effect. Marsilius Ficinus says: 'From the remote cause the effect does not necessarily follow. This idea of necessity—the necessary connection between the cause and the effect—is the prime distinction between a proximate and a remote cause. The proximate cause being given, the effect must follow. But, although the existence of the remote cause is necessary for the existence of the effect (for, unless there has been a remote cause, there can be no effect), still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow.' 4 Am. L. Rev., pp. 201, 205. In *Marble v. Worcester,* 4 Gray 396, Chief Justice Shaw said: 'On account of the difficulty in unravelling a combination of causes, and of tracing each result, as a matter of fact, to its true, real and efficient cause, the law has adopted the rule before stated, of regarding the proximate, and not the remote, cause of the occurrence, which is the subject of inquiry.' In *Crain v. Petrie,* 6 Hill 522, 524, 41 Am. Dec. 765, the question of special damages was involved, and, consequently, the question of proximate cause; that is, wheth-

er the special damages were the legal and natural consequences of the wrong complained of. Nelson, Ch. J., 44 L. R. A., in that case said: 'To maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained of.' In *Milwaukee and St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 259, it was said: 'The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. In *Hofngale v. New York C. & H. R. R. Co.*, 55 N. Y. 612, it was held that the act of one person cannot be said to be the proximate cause of an injury when the act of another person has intervened and directly inflicted it.

"Another principle of proximate cause which seems to be well established is that an accident or injury cannot be attributed to a cause unless, without its operation, it would not have happened. *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. St. Rep. 574; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492: *Ayres v. Hammondsport*, 130 N. Y. 665; *Grant v. Pennsylvania & N. Y. Canal & R. Co.*, 133 N. Y. 657. When damages claimed in an action are occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which he is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause, and the jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the act of the defendant is not sufficient. *Searles v. Manhattan R. Co.*, 101 N. Y. 662. The plaintiff must fail if the evidence

> does not show that the injury was the result of some cause for which the defendant is responsible; and, where the proof is by circumstances, the circumstances themselves must be shown, and not left to rest in conjecture; and, when shown, it must appear that the inference sought is the only one which can fairly and reasonably be drawn from the facts. *Ruppert v. Brooklyn Heights R. Co.*, 154 N. Y. 94."

In 22 R. C. L., p. 124, 137, it is said that wrongful acts of independent third persons not actually intended by the defendant, are not regarded by the law as the natural consequence of his wrong and he is not bound to accept the general probability of such acts any more than a particular act by this or that individual. The rule applies *a fortiori* to criminal acts.

Again, it is said at page 122 of 22 R. C. L.:

> "It is not enough to prove that the act is the natural consequence of the negligence. It must also have been the *probable* consequence. A probable consequence is one that is more likely to follow the supposed cause than it is to fail to follow it."

In *Carter v. Atl. Coast Line R. Co.*, 95 S. E. 357, 11 A. L. R. 1411, a station agent suing under the Federal Act sought to recover from the railroad for injuries resulting from an assault committed upon him by a robber, on the theory that the negligent and insufficient lighting of the station made the assault possible. It was held, however, that the negligence, if any, in not sufficiently lighting the station, was not the proximate cause of the injury. The court said:

> "Certainly, the want of light did not directly cause or contribute to the injury. There

was no causal connection whatever between the two events. That kind of an injury was neither a natural nor a probable consequence which might have reasonably have been expected to result from the failure to keep all the lights burning. The want of light was merely a condition which might or might not have influenced the intervening independent act of the robber, over whom defendant had no control.

"The authorities are practically unanimous in holding that, when the negligence alleged appears merely to have brought about a condition of affairs, or a situation under which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause. The doctrine is discussed and illustrated by numerous cases in Thomp. Neg. Sec. 43, *et seq.* A late case in point is *Chancey v. Norfolk & W. R. Co.*, 174 N. C. 351; L. R. A. 1918A, 1070; 93 S. E. 834; Ann. Cas. 1918E, 580, in which the court held that a carrier was not liable for the robbery of a passenger, alleged to have been caused by the insufficient lighting and overcrowding of its cars.

"As the facts, viewed in the most favorable light for plaintiff, were undisputed and susceptible of but one reasonable inference, the decision of question was one of law for the court."

In *Frazer v. Chicago, R. I. & Pac. R. Co.*, 165 Pac. 831, L. R. A. 1917E, 749, the suit was brought under the Federal Employers' Liability Act for injuries received by the plaintiff employee from the assault of an intruder. The negligence relied upon was the failure on the part of the defendant to close and bolt the doors of the freight house where the plaintiff performed duties at

night, which gave access to the intruder, who shot the plaintiff. Holding that the negligence, if any, was not the proximate cause of the injury, the Supreme Court of Kansas said:

> "The omission of the door man to bolt the closed door, and the shooting of the plaintiff, do not bear to each other the relation of cause and effect. Omission to bolt the door was fraught with no peril to the plaintiff, active or patent. Bolted or unbolted, the door was not a hazard which plaintiff encountered in his rounds, and omission to bolt it neither supplied not set in action any dangerous instrumentality or agency. It merely created a condition which made entrance to the building less difficult than it otherwise would have been, should any one desire to enter.
>
> "The injury resulted from the violent and malicious act of a desperate person who took advantage of the condition to enter the building for some purpose not disclosed. He may have gone there to steal. When surprised, he exhibited such conduct as he willed, shot the plaintiff, and fled, but conduct which originated with him, and which did not originate with the door man or the door the evening before.
>
> "The plaintiff cites the well-known authorities to the effect that, if the action of an intervening cause might have been anticipated, the intervening cause will not interrupt the connection between the original cause and the injury. The rule is sound, but it presupposes an original cause of injury which manifests consequences in an injurious result. We all anticipate pocket picking when the circus comes, and housebreaking during fair week; but the circus and the fair are not the causes of such crimes.

We know, too, that should a housebreaker be discovered in the act of committing burglary, he might do violence to a person interrupting his depredation. But if, knowing the city to be infested with such characters, we go out for the evening leaving the back door unlocked and leaving a servant in the house, omission to lock the door is not the cause of the burglary, should one occur, or the cause of the injury to the servant who tries to intercept commission of the crime. The cause of injury originates with the burglar, whose entrance into the house was not obstructed by a locked door."

IV.

The evidence leaves it wholly uncertain whether, if more guards had been provided on the car, the shooting would not have occurred.

It is submitted that it is wholly a matter of speculation whether the presence of any more guards on the car would have prevented the shooting. To assume that they would, or that it was for the jury to find that in such a way the shooting would have been prevented, was to allow the jury to speculate upon possibilities or probabilities wholly outside the limits of the record. It is perfectly evident from the testimony that the murderers got on the car with the definite purpose of killing Weathers, and possibly Mills, either on the car or of removing him from the car and then doing so. When Weathers was seized by one of the men who came into the car from the rear platform and Weathers resisted, the shooting commenced—a circumstance indicating definitely that the purpose of the strikers was to get Weathers, dead or alive. It is equally probable, if there had been two, or three, or four guards on the car instead of

the one man, Cantrell, when the street car stopped at Thrash Station where the shooting took place, that the strikers would have singled out Weathers and Mills, shot them, and leaped from the street car into the darkness, regardless of the presence of other guards who were the objects of their hostility equally with Weathers and Mills, as to assume or speculate that they would have desisted from their purposes. The presence of more guards could not have prevented the sudden volley that actually came from the back of the car.

The jury were allowed to speculate upon possibilities and probabilities having no basis in the evidence.

> "A servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition, whether the injury was or was not due to the negligence of the master."
>
> Vol. 4, Labatt, Sec. 1604.

It has been the rule announced for years by all the authorities, that where the testimony leaves the matter uncertain and shows that the injury may have been brought about as a result of some act of negligence, or as a result of some independent cause, and the evidence leaves it uncertain as to what is the proximate cause, then there can be no recovery.

As said by Judge Sanborn in *Midland Valley R. Co. v. Fulghum*, 181 Fed. 91:

> "Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the property or money of one litigant to another. Substantial evidence of the facts which constitute the cause of action is indispensable to the maintenance of the verdict sustaining it."

As the court said in *Patton v. Texas & Pac. R. Co.*, 179 U. S. 658, 45 L. Ed. 361:

> "It is not sufficient for an employee to show that an employer could have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion."

Respectfully submitted,

Forney Johnston

Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1925
No. 264

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,
Petitioner,

vs.

ODELL MILLS, AS ADMINISTRATRIX OF THE ESTATE OF IRA S. MILLS, DECEASED,
Respondent.

ON WRIT OF CERTIORARI TO THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

The writ of certiorari in this case was granted to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed a judgment rendered by the District Court for the Northern District of Alabama in favor of the plaintiff, respondent here, in an action under the Federal Employers' Liability Act to recover for the death of respondent's intestate.

The opinion of the Circuit Court of Appeals is reported in 3 Fed. (2nd Series) 882.

The broad ground upon which the jurisdiction of this Court is invoked is that the respondent's intestate, Ira S. Mills, was not employed in interstate commerce

within the meaning of the Federal Employers' Liability Act, at the time of his death.

The precise questions raised in the District Court and in the Circuit Court of Appeals appear in the following

STATEMENT OF THE CASE

This action, in which judgment was rendered against petitioner for $13,750 in the District Court, was brought to recover damages of the defendant railway company, the petitioner here, for the death of Ira S. Mills who, during the shopmens' strike on the railroads in August, 1922, while returning from work after having terminated his hours of service for the day and while on a public street car in the city of Birmingham, Alabama, was shot to death by strikers.

Mills, the decedent, was employed by petitioner (hereinafter referred to as defendant) as a car repairer during the strike in the summer of 1922. On the night of August 3rd after he had completed his work in the defendant's yards at Birmingham, had gone off duty and was returning home on one of the street cars of the Birmingham Railway, Light & Power Company, he was shot to death by unidentified strikers who opened fire without warning from the rear platform of the street car upon Mills, and upon Weathers, a companion car repairer, and Cantrell, a deputy sheriff employed by the defendant who was guarding the two men from work to their homes.

The theory of liability which the trial court submitted to the jury and which the Circuit Court of Appeals sustained on the appeal of the defendant railway com-

pany from the judgment that ensued was: (1) Even though Mills had completed his entire work, had left the premises of the defendant and was on his way home in a public conveyance he was still "employed in interstate commerce" within the meaning of the Federal Act; and (2) while so employed, the defendant could, as the jury was allowed to find, have been guilt of a negligent failure to furnish greater protection to Mills in the form of a stronger guard which might, by a greater display of force have deterred the murderers from accomplishing or attempting to accomplish, the murder.

The idea that defendant may have rested under a duty to furnish a stronger guard for Mills and his companion Weathers was predicated upon testimony given by Weathers that threats had been made by strikers against him, Weathers, information as to these threats given by Weathers to Wilkins, the man in charge of the deputies guarding the yards, and some slender and indefinite testimony tending to show cowardice on the part of Cantrell, the guard, in the face of strikers on other occasions.

The trial court, however, expressly declined to submit to the jury any question as to whether on the occasion of the murder, Cantrell was guilty of negligence or cowardice proximately inducing the shooting.

That one of the last tasks performed by Mills before he left the yards was connected with interstate commerce is conceded, but it was and is the contention of petitioner that upon the cessation of that task, and an hour later, of Mills' duties for the night, all possible connection with interstate commerce came definitely to an end: that the relationship of master and servant between the defendant and Mills did not continue during the time

of the journey on the street car and that at the time of the murder there was no possible employment in interstate commerce, so as to furnish the basis for a cause of action under the Federal Act.

The theories of liability were elaborated by the trial court in the oral charge to which the defendant reserved numerous exceptions, and by the court's refusal of the defendant's requested instruction directing a verdict in its favor.

The evidence (Record pp. 32, 33) showed that the last work in interstate commerce done by Mills was the inspection of an interstate train about ten o'clock. Thereafter Mills and Weathers took their tools back to the yard office, turned in their report, washed up and at fifteen minutes past eleven left the yards with Cantrell, the guard. They walked some distance, took the street car, and shortly thereafter one of three strikers on the back platform of the street car attempted to force Weathers to leave the car as it stopped to take on a passenger. When Weathers resisted the strikers commenced shooting into the car and Mills was mortally wounded.

Upon the foregoing undisputed facts it was and is the contention of petitioner:

(1) That Mills was not, at the time of the shooting, employed in interestate commerce;

(2) That petitioner rested under no duty to provide Mills with a heavier guard than it did;

(3) That it is wholly a matter of speculation and conjecture whether the shooting would have been averted, even if a heavier guard had been furnished;

(4) That irrespective of any question of negligent failure of the petitioner in that particular, the immediate proximate cause of the death of Mills was the interven-

ing wrongful act of the strikers for which petitioner was in no way responsible.

The following portions of the oral charge of the District Judge, to which the defendant reserved appropriate exceptions, show the theory upon which the case was submitted to the jury: (Record pp. 56-60).

(a) "So the first question is to determine whether Mr. Mills was an employee of a kind that could have brought a suit, had he lived, under the Federal Employers' Liability Act. If he was, then, of course, his administratrix could bring a suit for his death.

(b) "Now, of course, there would have to be shown a duty on the part of the company to take care of him beyond his place of work and to his home in order that he remain an interstate employee when he was shot.

(c) "And you would have to find that in this case in order to put him in the status of one who had a right to sue under this act, and he would have had to remain an employee, not only on the company's premises, but at the time of the shooting, that is, on his way home, and, therefore, until he got home, in order that he be entitled, or that his administratrix be entitled to sue under this act.

(d) "That is to say, if there was a duty that attended while he was on his way home on the part of the company to protect him and to give him protection then a violation of that duty would be a violation of a duty to an interstate employee while he was on his way home from doing interestate work at the company's premises.

(e) "Now, it is for you to say whether he was an employee in the sense that he was engaged in interstate commerce, or employed in interstate

commerce at the time of his death, depending, as I say, on whether or not he did work before he left the yards inspecting interstate trains; second, whether he was protected by employment or custom that existed in this case that he was to be protected beyond the company's property and to his home.

(f) "If you find those two things, then you have a right to say that he was an interstate commerce employee at the time he was shot.

(g) "The next proposition is whether there was any negligence on the part of the company that he could complain of as an employee under the Federal Employers' Liability Act.

(h) "Therefore, your first inquiry on this would be whether there was any duty on the part of the railroad company to protect him against assault from strikers at the time he was hurt.

(i) "Of course, that rule could be modified by a contract made between him and the company that they would protect him or give him protection not only while he was on their premises, but while he was going to and fro between their premises and home.

(j) "So it is that if, by custom, they had been furnishing protection for such length of time as would induce employees to believe that employees would be protected and they would undertake to furnish protection, then it would be a question of fact for you to determine, not me, whether out of that custom a duty would or would not spring up to furnish protection, not only on the premises, but on the journey of the man to his home.

(k) "That is to say, if for some length of time they had been in the habit of furnishing guards to take the men to their homes, and the men had been working under that custom, undertak-

ing a surety, then it would be a question of fact whether a duty arose from those acts on the part of the company to continue to furnish guards on any particular trip.

(l) "You must find there was a duty in order to predicate negligence.

(m) "Now, the contention of the plaintiff is this: She says that there was an inefficient guard, in numbers, furnished the decedent, Mr. Mills, and that there was negligence, and that if there had been a sufficient guard, in numbers, furnished, the assault would have been prevented by the presence of more guards and the plaintiff's intestate would not have been killed.

(n) "Now, in this case it seems to me your attention should be converged on what Wilkins did, because, as I understand, the railway company itself had guards around and could not be charged with negligence in not furnishing sufficient guards at East Thomas.

(o) "The question would be, it seems to me, whether Wilkins under the circumstances sent enough guards with these two men, Weathers and Mills.

(p) "Now, the question is whether you believe that a reasonably prudent man would have anticipated danger, if you believe that those things were told to Wilkins, from the reports that were made to him, were of such a character that would have made a reasonably prudent man have reinforced the guard and send the guards with them.

(q) "On the other hand, if you believe the reports were made as stated by Mr. Weathers, and if you believe from all the circumstances and the situation of the strike, a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he would have sent more guards than one

guard, then that failure to send more guards than one guard, you might say was—you might find negligence on the part of Wilkins. It is for you to say whether it was or not.

(r) "On the other hand, if you are reasonably satisfied that there was a departure from due care on the part of Wilkins, and that he was guilty of negligence in not sending more guards along with Weathers and with Mills, and you find that to be negligence on his part, * * *

(s) "Then you would next inquire whether it was a cause or proximate cause of the plaintiff's intestate's death.

(t) "If you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also find that a greater guard should have been furnished in the exercise of due care, then, then that would show that that was the causal relation in the failure to furnish it and the accident resulting in the death of the intestate."

The Circuit Court of Appeals in affirming the judgment by its opinion handed down on the 17th day of December, 1924, held:

"The employee's day's work being in both intrastate and interstate commerce, while, after finishing his day's work, he was making a trip which was a necessary incident of that work as a whole, he was employed in interstate commerce. *Erie R. R. Co. v. Winfield*, 224 U. S. 170. Though when the employee was shot he had left the employer's premises and was on a vehicle operated by a third party, it fairly may be said that he was still an employee if the trip he was making was in immediate connection with his employment, and during that trip the

employer owed him a duty, the performance of which was part of the consideration by which he was induced to enter upon and continue the employment. *Wilson v. Banner Lumber Co.*, 32 So. 460; *Doyle v. Fitchburg R. Co.*, 25 L. R. A. 157. The evidence as to the circumstances under which the employee entered upon and remained in the employer's service furnished support for an inference that the employer's undertaking to furnish the employee protection during the trip from his home to the place of work and from the place of work back to his home was part of the consideration moving to the employee for the service rendered. It might be inferred that such protection had to be furnished to obtain labor at the place needed, and that the relation of employer and employee still continued while the employee was on his way from his place of work to his home accompanied by a guard furnished by the employer pursuant to an implied obligation to protect the employee from perils to which he was exposed in consequence of his employment. There was evidence furnishing support for a finding that there was negligence in the matter of having the employee guarded while he was returning to his home."

As to the question of proximate cause the Court of Appeals said:

"Negligence properly may be regarded as the proximate consequence of an injury if it appears that the injury was the *natural* and *probable* consequence of the negligence, and that in the light of the attending circumstances it ought to have been foreseen by the wrongdoer. A careless person is liable for all the *natural* and *probable* consequences of his mis-

> conduct. If the misconduct is of a character which according to the usual experience of mankind is calculated to *invite* or *induce* the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. *Milwaukee, etc., Railway Co. v. Stone*, 213 U. S. 1, 9; *Delaware & Hudson Co. v. Ketz*, 233 Fed. 31. If the employer negligently failed to perform a duty incurred by it to protect the deceased from assault or personal violence while on the trip from his place fo work to his home, and if in the circumstances of that misconduct a natural and probable consequence of it was a reasonably avoidable exposure of the deceased to personal violence during that trip, and in the light of those circumstances the employer ought to have foreseen that such misconduct on its part was calculated to invite or induce peril to the deceased which resulted in his injury and death, the fact that the source of that peril was an independent agency would not keep the deceased's death from properly being held to be the result of his employer's negligence." (Italics ours.)

Petitioner respectfully asserts that upon each of the two vital issues in the case the foregoing conclusions of the Circuit Court of Appeals are erroneous; that the judgment of the said Court of Appeals was in error and that said Court should have reversed the judgment and remanded the cause to the District Court.

The decision of the Court of Appeals was not unanimous. See dissenting opinion of Estes, District Judge, at page 885 of 3 Federal Reporter (2nd Series). The attention of the Court is called to the fact that the dis-

senting opinion does not appear in the record. The omission is explained by the fact that when the record on the petition for certiorari was completed by the Clerk of the Circuit Court of Appeals, the dissenting opinion had not been filed.

But the following analysis in the dissenting opinion of Judge Estes discloses the unsoundness of the majority opinion:

> "I do not concur in the view of the majority of the Court that the employee in this case was, at the time of his death, engaged in interstate commerce, I do not think, therefore, that the rights of the parties are to be determined by the provisions of the Federal Employers' Liability Act. (Comp St. 8657-8665.)
>
> "That act can, under the Constitution and by its own terms, apply only to cases where both the employer and the employee, at the time of the injury, were engaged in interstate commerce. Employers' Liability Cases, 207 U. S. 501, 28 S. Ct. 141, 52 L. Ed. 297; 8 Fed. Stat. Ann. 1208. Of course, in the great variety of circumstances and conditions that continually arise, its application sometimes becomes a difficult problem. But it is quite manifest that, in order to come within its provisions, the work being done both by the employer and the employed, when the injury occurs, must have such imminent or immediate connection with the interstate commerce work of the road as to be, in a very real sense, a part of such commerce. *Shanks v. Delaware Railroad*, 239 U. S. 556, 36 S. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; *Pedersen v. Delaware Railroad*, 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. The fact that the work was in the nature of preparation for work that has to do with interstate commerce, the general character or

scope of an employee's duties what he may have done before he was injured, or what he intended to do afterward, are relatively unimportant. The nature of the work being done at the immediate time of the injury—the task at hand—is the determining factor. *Chicago Railway v. Harrington*, 241 U. S. 177, 36 S. Ct. 517, 60 L. Ed. 941; *Minneapolis Railway v. Winters*, 242 U. S. 354, 37 S. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54; *Shanks v. Railroad, supra.*

"In every case where the application of the act has been considered by the Supreme Court, this test, in so far as I have been able to ascertain, has been applied. *Pederson v. Delaware Railroad*, supra; *North Carolina Railway v. Zachary*, 232 U. S. 260, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; *Illinois Railway v. Behrens*, 233 U. S. 473, 34 S. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; *Delaware Railroad v. Yurkonis*, 238 U. S. 439, 35 S. Ct. 902, 59 L. Ed. 1397; *Shanks v. Delaware Railroad, supra; Minneapolis Railway v. Winters, supra; Erie Railroad v. Winnfield*, 244 U. S. 171, 37 S. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918E, 662; *Lehigh Railway v. Barlow*, 244 U. S. 183, 37 S. Ct. 515, 61 L. Ed. 1070.

"The evidence in this case shows without dispute that the day's work of the injured employee had been concluded. His tools had been put in place and his reports had been made. He had left the employer's premises, and was shot when en route home on a street car. As I view it, neither the employer nor the employee were engaged in interstate commerce at the time of the tragedy, or, indeed, in commerce at all.

"Every employee of a railroad must, in order to report for work, leave his home in the morning and return at the close of the day. Such a trip may be said to be "a necessary in-

cident of his work as a whole." If that were the decisive thing—that is, that the trip was necessary to his work as a whole—then any employee whose work on the railroad is of an interstate character may be said to be engaged or employed in interstate commerce when making such trips. The relation to interstate commerce in that instance would be the same as in this case.

"If there was a duty on the part of the employer to furnish protection to an employee at such time, it was a duty occasioned by a special obligation or contract to do so. It might be, as the trial court said in his charge, that " a violation of that duty would be a violation of the employer's duty to an interestate employee," but the point is that in order to make the statute applicable, the employee must, at the time of his injury, have been more than an interstate employee. He must, at such time, have been himself engaged in interstate commerce. This is true, even though it may be said that under the conditions "the deceased was an employee of the company, and the protection was a part of the consideration which induced him to enter upon and continue in the employment." That fact would not mean that he was engaged in interstate commerce at the time of his injury."

The opinion of the Circuit Court of Appeals announces:

(1) A radical extension of the scope of the Federal Employers Liability Act in two vital particulars since it holds: (a) That the relationship of employer and employee exisits even though the employee has terminated his work and is on his way home on a vehicle not under the control of the employer and while the em-

ployee though under the protection voluntarily afforded by the employer, is no longer in any sense under the employer's dominination or control; (b) That the voluntary act of the employer in affording an employee protection from violence immediately becomes transmuted into a legal duty resulting from the contract of employment which the employer must perform in such a way as to insure the safety of the employee.

(2) A novel and unsound extension of the theory of proximate cause in its relation to an independent, intervening criminal act that actually and directly resulted in the death of Mills in holding: (a) That the shooting of Mills on a public conveyance in the presence of the car crew and other passengers was a "natural and probable consequence" of the failure of the defendant to furnish a heavier guard, and one which the defendant could reasonably have anticipated; (b) That the supposed negligence of the defendant invited and induced the shooting.

The theory as to proximate cause announced by the Circuit Court of Appeals is an unsound and erroneous application of the language of the opinion of this court in the leading case of *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, which invoked a principle of the law of proximate cause wholly inapplicable to the case at bar.

ARGUMENT

I

Mills Not Employed in Interstate Commerce.

While it is true that one of the last duties performed by Mills before leaving the yards at East Thomas was

that of an interstate employee, it is submitted that there is no basis, either in law, or in fact, for holding that it was for the jury to decide that the interstate status of Mills remained with him until the time of his death. As a matter of fact he remained, according to the undisputed testimony, in the yards for some time after completing his last interstate service in connection with the train to Amory.

His duties to the company, and his hours of service under his employment terminated when he left the yards at East Thomas. Thereafter, the protection which the defendant sought to accord Mills, while of course given in part in its own interest, had no relation to any former interstate status of Mills.

It is true that a number of cases have held that an employee still retains that relationship to the employer, either while on the premises of the employer or riding to or from work free, on a conveyance furnished by the meployer, but in an elaborate analysis of that line of decisions, Labatt says (Vol. 4, p. 4674):

> "The decisions reviewed in the preceding sub-section are referable to the conception that the master retains the right to control the serright, although ordinarily dormant during the period of transportation, is susceptible of being at any moment called into active operation."

In the present record there is absolutely nothing to indicate that the work of Mills for the night, and any control of his future action by the defendant, had not definitely ended. Again, it is said by Labatt (Vol. 4, p. 4679), in referring to those cases holding that the serv-

ant could not recover because of the negligence of a fellow servant:

> "Both on principle and authority it is clear that the defense of common employment is not available to the master where the injured person was traveling entirely for his own purposes and the right of the master to exact the performance of services was not merely dormant but wholly suspended."

The test of whether there is an interstate relationship has been repeatedly stated by this court, and in no decision more clearly than in *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051. There, it was contended for the plaintiff that although at the moment of the injury the plaintiff was engaged in an intrastate movement, he would immediately afterward have become engaged in interstate commerce. The court said:

> "That he was expected upon the completion of that task to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

And in *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319, it was held that a yard conductor on an interstate railway injured while alighting from a slowly moving freight engine, for the purpose of reporting to the yardmaster's office for further orders, having executed all previous orders, was not an employee in interstate commerce, although the orders which he would have received had he not been injured would have required him

immediately to make up an interstate train. The court said:

> "It was in evidence also that the orders plaintiff would have received had he not been injured on his way to the yard office would have required him immediately to make up an interstate train. Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion this view is untenable. By the terms of the Employers' Liability Act the proper test is the nature, of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act."

The following language from the opinion in *Minneapolis, etc., R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358, is in point, where the court, holding that the mere expectation that an engine when repaired would be employed in interstate commerce was not sufficient to create an instrumentality of commerce at the time of the injury, said:

> "It simply had finished some interstate work and had not yet begun upon any other. Its next work so far as appears might be interstate or confined to Iowa as it might happen. *At the moment it was not engaged in either.* Its character as an instrument of commerce depended upon its employment *at the time*, not upon remote probabilities or accidental later events." (Italics ours.)

And in *So. Ry. Co. v. Puckett,* 244 U. S. 571, 61 L. Ed. 1321, the court, in deciding the question whether at the time of the injury an employee was engaged in interstate commerce, said:

> "Of course we attribute no significance to the fact that the plaintiff had been inspecting interstate commerce before he was called aside by the occurrence of the collision."

And in *So. Ry. Co. v. Pitchford,* 253 Fed. 736, the Circuit Court of Appeals for the Fourth Circuit observed:

> "It is immaterial that the plaintiff's last previous work may have been cleaning an interstate car, or that his next work would certainly have been icing an interstate car from the ice box."

The present case is obviously distinguishable from the decision of the *Supreme Court in Erie R. Co. v. Winfield,* 244 U. S. 170, 61 L. Ed. 1057, where an employee injured while in the act of leaving the yards after having been there employed in interstate commerce, was held to be entitled to sue under the act. For there, Winfield was still on the employer's premises, and under all the decisions entitled to the protection of the relationship while leaving the yards because the company owed him a duty to enable him to get beyond its premises without being exposed to the negligence of other employees. And the case at bar is obviously distinguishable from the situation presented in *North Carolina R. Co. v. Zachary,* 232 U. S. 248, 58 L. Ed. 591, where the deceased, a fireman, having just finished oiling his engine preparatory to go-

ing out on an interstate run, was killed while on his way to his boarding house just outside the yards, for some temporary purpose. The reason for the decision in the *Zachery* case was that there was no cessation of the interstate employment and that the mere temporary interruption of the actual work did not sever the interstate relaionship of the deceased to the defendant company. The present case is much more closely related to the principle that controlled the decision of the court in *Fletcher v. Baltimore & Ohio R. Co.*, 168 U. S. 135, 42 L. Ed. 411. There the plaintiff had finished his day's work in the defendant's shop, and while on his way home from work, while standing in a public street near one of the defendant's tracks, was struck by a missle thrown from one of the defendant's trains by one of its employees. Answering the contention that the plaintiff still occupied the relationship of an employee and could not recover because the injury resulted from an act of a fellow employee, the Court said:

> "The plaintiff at the time of the accident had finished his employment for the day and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have. The liability of defendant to plaintiff for the act in question is not to be gauged by the law applicable to fellow-servants. The facts existing at the time of the accident do not bring it within this rule."

In Volume 1, of Roberts, on Federal Liabilities of Carriers, a leading work on the Federal Employers' Liability Act, it is said in Section 58:

> "A common carrier by railroad is liable only to the servant when the latter is actually

> in the service, and the relationship does not exisit where is appears that the performance of the work has been completed."

The definitions "employee" and "employed" were not intended to be changed in any way by the Federal Act.

> "In the Employers' Liability Act, Congress used the words 'employe' and 'employed' in their natural sense, and intended to describe the conventional relation of employer and employee."
> *Hull v. Phila. & R. R. Co.*, 252 U. S. 475; 64 L. Ed. 670.

So it has been held in the following cases that the injured man was not at the time of the injury employed in interstate commerce:

A conductor leaving his train at a station and having registered, and then boarded another train with the operation of which he had nothing to do, for the purpose of going home—*Dodge v. Chicago Great Western Ry. Co.*, 164 Ia., 627, 146 N. W. 14;

A car record clerk who, having finished the day's work and having turned in his report, was killed while leaving the yards—*Jacoby v. Chicago, etc., R. Co.*, 165 Wis. 610, 161 N. W. 751;

An employee riding home in the employer's train, on a pass, after completing the day's work as fireman on an interstate train—*Knorr v. New Jersey Cent. R. Co.*, 268 Pa. 172, 110 Atl. 797. (Pa.)

In *Gray v. Chicago & N. W. R. Co.*, 153 Wis. 637, 142 N. W. 505 (Wis.), an engine hostler who worked indiscriminately on interstate and intrastate engines, was not while walking back to his shanty to await the com-

ing of another locamotive, an employee during such period of idleness, in interstate commerce.

It is therefore submitted that on no theory can it be held that Mills was employed in interstate commerce at the time of his murder, and that the court erred in allowing the jury to find, not only that the relationship of master and servant existed between the defendant and Mills, but that his interstate employment continued until the shooting.

If the theory of the lower courts is sustained, then obviously the mere fact that the last task that an employee performs before definitely quitting work and terminating his hours of service, imparts to his entire subsequent relationship with the employer, and until the employee at some remote time performs an act connected with intrastate commerce, the status of an interstate employee.

Such a conclusion, we submit, violates the fundamental conception of the Federal Act, and necessarily results in an absorption into the field of interstate commerce of the entire relationship of the employee to the employer, at all times when the employee is not actually engaged in some specific act of *intrastate* commerce. Such a conception is entirely contrary to the test announced by the Supreme Court in numerous decisions in the form of this question:

> "Was the employee at the time of the injury employed in interstate transportation, or in a work so closely related to it as to be practically a part of it?"
> *Shanks v. Delaware L. & W. R. Co.*, 239 U. S. 566; 60 L. Ed. 436.

II

The fact that the defendant furnished armed protection to its employees against strikers did not create a duty on its part to furnish at its peril such protection as would insure the employee against injury.

The reasoning of the Circuit Court of Appeals does not stand analysis. Citing the case of *Erie Railroad Co. v. Winfield, supra*, the opinion says:

> "Though when the employee was shot he had left his employer's premises and was on a vehicle operated by a third party, it fairly may be said that he was still an employee if the trip he was making was in immediate connection with that employment, and during that trip the employer owed him a duty, the performance of which was part of the consideration by which he was induced to enter upon and continue in the employment."

There is not a word of testimony in the record that any promise of protection was made by the railway company to Mills at the time he was employed, or that any such promise entered into the relationship.

Proceeding further the Court of Appeals said:

> "It might be inferred that such protection had to be furnished to obtain labor at the place needed, and that the relation of employer and employee still continued while the employee was on his way from his place of work to his home accompanied by a guard furnished by the employer pursuant to an implied obligation to protect the employee from perils to which he was exposed in consequence of his employment. There was evidence furnishing support for a finding that there was negligence in the matter

of having the employee guarded while he was returning to his home."

The necessary hypothesis for any such conclusion is that the railway company had at its command unlimited forces and complete protection for Mills if it had chosen to furnish it—a praetorian guard for each employee. If such had been the case on this and other railroads, violence on the part of strikers would have been impossible, yet it is a matter of common knowldge that in this particular strike as in many others, the utmost care consistent with any reasonable outlay for protection, failed in numberless instances to avert violence and bloodshed.

In the last analysis the doctrine announced by the Court of Appeals makes the employer virtually an insurer, and in every case where a sudden and unexpected attack is committed, it becomes a question for the jury to determine whether more stringent precautions might have averted a murder—we say "might have" because no one man or twelve could say with any reasonable certainty whether or not the presence of three or four guards would surely have prevented the attack, launched from the rear platform of a street car from which the assailants immediately disappeared into the darkness.

It would seem that the least probable place where the defendant would naturally have anticipated such an occurrence as this was upon a public conveyance, carrying passengers other than Mills, Weathers and Cantrell, whose lives were necessarily endangered by the shooting.

We have been unable to find any decision either from the state or federal courts, in any case based on the Federal Employers' Liability Act, involving the duty of an employer to guard an employee against the acts of

strikers, but the question has arisen in several cases under state compensation acts where the question directly presented was whether an injury to an employee from the acts of strikers was received in the course of his employment.

In *Lampert v. Seimons*, 235 N. Y. 311, 139 N. E. 278, the New York Court of Appeals held that injuries to a department head who continued to work during a strike of the employees, resulting in an assault by a striker while the employee was on his way to work, did not arise during the course of the employment.

The discussion of the applicable principle is so directly in point that we quote in full from the opinion:

> "Had there been no strike, Lampert's employment would have ended when he left the factory at 134 West Thirty-ninth Street. His work was indoor work as foreman of the operating room. There was no work for Lampert to do for his employer after he left the factory at night and before he reached there in the morning. Therefore, all the authorities agree that, while going to and from his work, Lampert, if injured, would not come under the Workmen's Compensation Law (Consol. Laws, c. 76), as such injury would not arise during the course of his employment. *Tallon v. Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327, 21 A. L. R. 1218; *Matter of Schultz v. Champion Welding & Manufacturing Co.*, 230 N. Y. 309, 130 N. E. 304; *Matter of Kowalek v. N. Y. Consol. R. R. Co.*, 229 N. Y. 489, 128 N. E. 888; *Matter of McInery v. Buffalo & S. R. Corp.*, 225 N. Y. 130, 130 N. E. 806; *Walters v. Stavely Coal & Iron Co., Ltd.*, 4 W. C. C. 303, House of Lords, 1911.
>
> "There is a line of cases which holds that

an employee injured while on the streets or in a conveyance may recover compensation. There are cases where the nature of the claimant's work took him to and in the place where he was injured, and where at the time he was actually engaged in doing that for which he was paid (*Matter of Redner v. H. C. Faber & Son*, 223 N. Y. 379, 119 N. E. 842); also compensation has been allowed where the employee was injured while travelling to and from his work in a conveyance furnished by the employer under the contract of employment and the necessities of the situation. (*Matter of Littler v. George A. Fuller Co.*, 223 N. Y. 369, 119 N. E. 554.) In this case, however, Lampert was not doing work for his employer while going to and from his home, neither was he being transported in a conveyance furnished by and under the control of his master.

"The application of the rule which has been made by the court below would carry us very far afield. If, under ordinary circumstances and within the authorities first above cited, Lampert was not carrying on any work for which he was employed while going home or coming to the factory, what was there in the strike which could possibly change this fact? The strike could not extend the field of his employment or the limits of his occupation unless he were employed to do something in connection with the strike, which of course is not this case. That he was in danger on the streets because of the strike is beyond question, but the danger existed at all times, and not necessarily while Lampert was going to and from his work. He could have been assaulted by a striker on the streets while he was going from his home to the theatre or to a dance or other place of amusement. If the limits of his employment

can be extended under such circumstances to cover the distance between his home and the factory, why cannot those limits also be extended to reach any place and any activity in which the workman may be after working beyond hours? The danger may exist in one place as well as another. The fact that the employer may have offered or ordered protection from strikers to the employee while he was upon the street and after the hours of his work would not or could not change the nature of his work or the time of its commencement and completion. The statute says that an employee must be injured while in the course of his employment. In this case Lampert's employment ceased when he left the factory.

"The views which we here express have been the ruling in other jurisdictions where a similar state of facts has presented the same question. *Poulton v. Kelsall*, L. R. 2, K. B. (1912) 131; *Rourke's Case*, 237 Mass. 360, 129 N. E. 603, 13 A. L. R. 564. In both of these cases there was an agreement to protect the employee from violence."

In *Poulton v. Kelsall*, 2 K. B. 131, 81 J. K. B. 774, 106 L. T. 522, it was held that a storekeeper acting as a carter during a carter's strike, on terms that he should be compensated for any injury to him done by strikers, and who was assaulted by strikers in a public street, while on his way home from work, was not injured during the course of his employment so as to be entitled to recover under the English Workmen's Compensation Act.

In *Medlin Milling Co. v. Boutwell*, 104 Tex. 87, 133 S. W. 1042, the court observed that—

"It is not the legal duty of a master to protect the servant from unlawful assaults by strangers."

In *Rourke's Case*, 237 Mass. 360, 129 N. E. 603, it was held that an injury caused by assault of a striker upon the claimant on a public street was not received within the course of the employment of the assaulted person within the meaning of the Workmen's Compensation Act, where he had left his place of employment for the day and was proceeding toward his boarding house, although because of a strike at the plant he was provided by the employer with a place to board and lodge, toward which he was proceeding accompanied by the master's superintendent, who had promised him protection. The court said:

"Unless the incidents of employment be exceptional the relation between a master and his servant is suspended when the servant leaves the place of his actual employment at the close of his day's work to go to his home, and again becomes active when, after the interval of rest, the laborer puts himself in a position where he can do the work of his employment at the place where it is to be performed. *Langley v. Boston Elev. R. Co.*, 223 Mass. 492, 496, 112 N. E. 79

"In the case at bar the day's work of the claimant came to an end when he dropped his tools, rang in his time, left the place of his employment, and entered upon the public highway. While not conclusive in the determination of the incidents of the employment, it is worthy of consideration that thereafter the employer under the contract of employment had no legal right to command the services of the

claimant and he was under no duty of obedience thereto.

"As bearing upon the question of the incidents of the employment, we can perceive no resemblance between a contract of protection against criminal acts of third persons who may seek to coerce a hostile employer to grant their demands through the intimidation of and assaults upon his servants and a contract of employment which has regard to conditions and circumstances which are the natural, and not abnormal, concomitants of the work to be performed under the contract, for example, agreements for transportation, when the place of work is at a distance. *McGuirk v. Shattuck*, 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110; *Kilduff v. Boston Elev. Co.*, 195 Mass. 307, 9 L. R. A. (NS) 873, 81 N. E. 191; *Donovan's Case*, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549. See *Harbroe's Case*, 223 Mass. 139, 142, L. R. A. 1916D, 933, 111 N. E. 709."

In *Roebuck v. A. T. & S. F. R. Co.*, 99 Kan. 544, 162 Pac. 1153, L. R. A. 1917E, 741, the action, brought under the Federal Act, was based upon the alleged negligent retention by the employer, of Megreta, a vicious employee, after warning to the employer of his propensities and the promise of protection to the deceased, who was thereafter shot and killed by Megreta. In holding that there was no liability, the court said:

"It is plain that it could not have been the intention of Congress to make the carrier liable for the injury or death of an employee occasioned by the act of a stranger. We are fully in harmony with the liberal interpretation of the Federal Employers' Liability Act by the Fed-

> eral courts generally; but we cannot conceive it to have been the intention of Congress to impose upon the carrier duties and obligations save those of an employer; nor that it was the purpose to impose new obligations not usually imposed upon employers except as the law of master and servant is by the express terms of the act itself limited or restricted."

And in *Davis, Director General v. Green*, 260 U. S. 349, 67 L. Ed. 249, it was held that no recovery could be had under the Federal Act for the intentional killing of plaintiff's intestate by a fellow employee, on the theory that the railroad negligently and knowingly employed a dangerous man.

III.

The death of Mills resulted from an independent intervening cause not proximately related to any negligence of the defendant.

It is submitted that in the first place, and regardless of other controlling considerations, that it could not conceivably have been the duty of the defendant to assume that murder would be committed by strikers on a public conveyance. The opinion of the Circuit Court of Appeals, on the other hand, proceeds on the contrary hypothesis: that the jury could say that "the injury was the *natural* and *probable* consequence of the negligence, and in the light of attending circumstances ought to have been foreseen" by the defendant. And again, proceeding upon the same erroneous theory, it is said:

> "If the misconduct is of a character which according to the usual experience of mankind, is calculated to invite or induce the interven-

> tion of some subsequent cause, the intervening cause will not excuse him and the subsequent misconduct will be held to be the result of the original misconduct. *Milwaukee, etc., Railway Co. v. Kellogg*, 94 U. S. 469; *Atchison, etc., Ry. Co. v. Stone*, 213 U. S. 1, 9; *Delaware & Hudson Co. v. Ketz*, 233 Fed. 31."

This language illustrates the misconception of the law of proximate cause that led to the judgment and its affirmance. For to say that the murder was the *result*, the *natural and probable consequence*, reasonably to be expected by the defendant from its failure to furnish a stronger guard is to transmute a mere inactive condition into an active causative force, responsible for the killing.

Such an idea violates the principle announced in the *Kellogg* case, cited by the Court of Appeals. There it was said:

> "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a succession of events so linked together as to make a natural whole; *or was there some new and independent cause intervening* between the wrong and the injury?" (Our italics.)

And this language, even stronger, from the opinion in the *Kellogg* case:

> "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. *They are not* when there is a sufficient and independent cause operating between the wrong and the in-

> jury. In such a case the resort of the sufferer must be to the originator of the intermediate cause."

Thus it appears that the Court of Appeals has misapplied the *Kellog* case in a manner directly affecting a controlling question here.

Again, as the court said in *A. T. & S. F. Ry. Co. v. Calhoun*, 213 U. S. 1, 53 L. Ed. 671:

> "Where in the sequence of events between the original default and the final mischief, an entirely independent and unrelated cause intervenes and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause, and the other the remote cause."

The following language from Cooley on Torts, 2nd Ed., p. 23, appears in the opinion in the *Calhoun case*:

> "It is not only requisite that damage should be suffered, but that this damage should be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded, and in the application of it the law rejects as not constituting the foundation for the action that damage if it does not flow proximately from the act complained of. The explanation of this maxim may be given thus. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause and refuse to trace it to that which was remote."

A careful analysis of the authorities discloses that the error of the Court of Appeals lies in the failure to distinguish between those cases in which the so-called intervening cause was one directly and obviously induced or put in operation as a result of the original negligence, and those cases where, as here, the intervening cause bore no relation whatever to the original negligence.

As in the *Kellogg* case, where the fire, negligently allowed to escape and set fire to a grain elevator was thence borne by the wind to the plaintiff's lumber and destroyed it.

For example, if one negligently leaves a dangerous explosive, attractive to children, in an unguarded place, and a child finding it, causes it to explode to the injury of a third person, the original negligence in leaving the explosive unguarded is obviously not insulated or turned aside by the act of the child. For there the negligence was such as to "invite or induce," to use the language of the Court of Appeals, an act by an irresponsible agent that directly put into destructive operation, the original negligence. See the typical case of *Shroka v. Halliday*, 41 R. I. 322, 103 At. 799, L. R. A. 1918E, 688.

But the defendant in the case at bar did nothing. It was guilty, at worst, of allowing a condition to exist which may have rendered easier the commission of the murder—the operation of the independent, intervening cause.

This distinction is clearly recognized and applied in the decision in *Jarnagin v. Travellers Protective Assn.*, 133 Fed. 892, 68 L. R. A. 499. There the contention was made that the negligence of police officers in failing while they held the deceased under arrest, to prevent his

murder by other persons, was the proximate cause of his death. But the Circuit Court of Appeals for the Sixth Circuit in an opinion concurred in by Judge Lurton, said:

> "The shots of his assailants were the direct and proximate cause and the failure of the officers to protect him was only a condition which may or may not have contributed to the result. It may have been easier to kill him because of the condition, but it was not the condition which killed him."

In the careful discussion of this question in the note to *Gilson v. Delaware, etc., Canal Co.*, 36 A. S. R. at p. 842, this rule is deduced:

> "As will be seen from the cases cited in the following paragraph, the courts, at least in this country, refuse to hold a tort feasor liable for the results of a subsequent act which is willfully wrong, unless that act was actually intended by him."

Following this the annotator citing the opinion of Justice Holmes says:

> "A very eminent judge thus states the principle governing these cases: 'Wrongful acts of independent third persons (not actually intended by the defendant), are not regarded in law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual.' *Burt v. Advertiser, etc., Co.*, 154 Mass. 238 (per Holmes, J.)"

This merely concurs in the familiar rule laid down in Wharton on Negligence, Sec. 134:

> "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? The question must be answered in the negative, for the general reason that causal connection between negligence and damages is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter (as to which I am not contractually bound). Another person, moving inadequately, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured."

No language could be more appropriate to the case at bar than the following excerpt from the opinion in *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216, 226:

> "As has been said in an anonymous article in the American Law Review: 'A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible: it is one which can be used as a term by which a proposition can be demonstrated, that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words,

a remote cause is a cause the connection between which and the effect is uncertain, vague, or indeterminate. It does not contain in itself the element of necessity between it and its effect. Marcilius Ficinus says: 'From the remote cause the effect does not necessarily follow. This idea of necessity—the necessity connection between the cause and the effect—is the prime distinction between a proximate and a remote cause. The proximate cause being given, the effect must follow. But, although the existence of the cause is necessary for the existence of the effect (for, unless there has been a remote cause, there can be no effect), still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow.' 4 Am. L. Rev., pp. 201, 205. In *Marble v. Worcester*, 4 Gray 396, Chief Justice Shaw said: 'On account of the difficulty in unraveling a combination of causes, and tracing each result, as a matter of fact, to its true, real and efficient cause, the law has adopted the rule before stated, of regarding the proximate, and not the remote, cause of the occurrence, which is the subject of inquiry.' In *Crain v. Petrie*, 6 Hill 522, 524, 41 Am. Dec. 765, the question of special damages was involved, and, consequently, the question of proximate cause; that is, whether the special damages were the legal and natural consequences of the wrong complained of. Nelson, Ch. J., 44 L. R. A., in that case said: 'To maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained

of.' In *Milwaukee and St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 259, it was said: 'The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. In *Hofngale v. New York C. & H. R. R. Co.*, 55 N. Y. 612, it was held that the act of one person cannot be said to be the proximate cause of an injury when the act of another person has intervened and directly inflicted it.

"Another principle of proximate cause which seems to be well established is that an accident or injury cannot be attributed to a cause unless, without its operation, it would not have happened. *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. St. Rep. 574; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492; *Ayers v. Hammondsport*,, 130 N. Y. 665; *Grant v. Pennsylvania & N. Y. Canal & R. Co.*, 133 N. Y. 657. When damages claimed in an action are occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which he is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause, and the jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the act of the defendant is not sufficient. *Searles v. Manhattan R. Co.*, 101 N. Y. 662. The plaintiff must fail if the evidence does not show that the injury was the result of some cause for which the defendant is responsible; and, where the proof is by circumstances themselves must be shown, and not left to rest in conjecture; and, when shown, it must appear that the inference sought is the only one which can fairly and reasonably be

drawn from the facts. *Ruppert v. Brooklyn Heights R. Co.*, 154 N. Y. 94."

In 22 R. C. L., p. 124, 137, it is said that wrongful acts of independent third persons not actually intended by the defendant, are not regarded by the law as the natural consequence of his wrong and he is not bound to accept the general probability of such acts any more than a particular act by this or that individual. The rule applies *a fortiori* to criminal acts.

Again, it is said at page 122 of 22 R. C. L.:

> "It is not enough to prove that the act is the natural consequence of the negligence. It must also have been the *probable* consequence. A probable consequence is one that is more likely to follow the supposed cause than it is to fail to follow it."

In *Carter v. Atl. Coast Line R. Co.*, 109 S. C. 119, 95 S. E. 357, 11 A. L. R. 1411, a station agent suing under the Federal Act sought to recover from the railroad for injuries resulting from an assault committed upon him by a robber, on the theory that the negligent and insufficient lighting of the station made the assault possible. It was held, however, that the negligence, if any, in not sufficiently lighting the station, was not the proximate cause of the injury. The court said:

> "Certainly, the want of light did not directly cause or contribute to the injury. There was no causal connection whatever between the two events. That kind of an injury was neither a natural nor a probable consequence which might have reasonably have been expected to result from the failure to keep all the lights

burning. The want of light was merely a condition which might or might not have influenced the intervening independent act of the robber, over whom defendant had no control.

"The authorities are practically unanimous in holding that, when the negligence alleged appears merely to have brought about a condition of affairs, or situation under which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause. The doctrine is discussed and illustrated by numerous cases in Thomp. Neg. Sec. 43,*et seq.* A late case in point is *Chancey v. Norfolk & W. R. Co.*, 174 N. C. 351; L. R. A. 1918A, 1070; 93 S. E. 834; Ann. Cas. 1918E, 580, in which the court held that a carrier was not liable for the robbery of a passenger, alleged to have been caused by the insufficient lighting and overcrowding of its cars.

"As the facts, viewed in the most favorable light for plaintiff, were undisputed and susceptible of but one reasonable inference, the decision of question was one of law for the court."

In *Frazer v. Chicago, R. I. & Pac. R. Co.*, 101 Kan. 122, 165 Pac. 831, L. R. A. 1917E, 749, the suit was brought under the Federal Employers' Liability Act for injuries received by the plaintiff employee from the assault of an intruder. The negligence relied upon was the failure on the part of the defendant to close and bolt the doors of the freight house where the plaintiff performed duties at night, which gave access to the intruder, who shot the plaintiff. Holding that the negligence, if any,

was not the proximate cause of the injury, the Supreme Court of Kansas said:

> "The omission of the door man to bolt the closed door, and the shooting of the plaintiff, do not bear to each other the relation of cause and effect. Omission to bolt the door was fraught with no peril to the plaintiff, active or patent. Bolted or unbolted, the door was not a hazard which plaintiff encountered in his rounds, and omission to bolt it neither supplied nor set in action any dangerous instrumentality or agency. It merely created a condition which made entrance to the building less difficult than it otherwise would have been, should any one desire to enter.
>
> "The injury resulted from the violent and malicious act of a desperate person who took advantage of the condition to enter the building for some purpose not disclosed. He may have gone there to steal. When surprised, he exhibited such conduct as he willed, shot the plaintiff, and fled, but conduct which originated with him, and which did not originate with the door man or the door the evening before.
>
> "The plaintiff cites the well-known authorities to the effect that, if the action of an intervening cause might have been anticipated, the intervening cause will not interrupt the connection between the original cause and the injury. The rule is sound, but it presupposes an original cause of injury which manifests consequences in an injurious result. We all anticipate pocket picking when the circus comes, and housebreaking during fair week; but the circus and the fair are not the causes of such crimes. We know, too, that should a housebreaker be discovered in the act of committing burglary,

> he might do violence to a person interrupting his depredation. But if, knowing the city to be infested with such characters, we go out for the evening leaving the back door unlocked and leaving a servant in the house, omission to lock the door is not the cause of the burglary, should one occur, or the cause of the injury to the servant who tries to intercept commission of the crime. The cause of injury originates with the burgler, whose entrance into the house was not obstructed by a locked door."

IV.

The evidence leaves it wholly uncertain whether, if more guards had been provided on the car, the shooting would not have occurred.

It is submitted that it is wholly a matter of speculation whether the presence of any more guards on the car would have prevented the shooting. To assume that they would, or that it was for the jury to find that in such a way the shooting would have been prevented, was to allow the jury to speculate upon possibilities or probabilities wholly outside the limits of the record. It is perfectly evident from the testimony that the murderers got on the car with the definite purpose of killing Weathers, and possibly Mills, either on the car or of removing him from the car and then doing so. When Weathers was seized by one of the men who came into the car from the rear platform and Weathers resisted, the shooting commenced—a circumstance indicating definitely that the purpose of the strikers was to get Weathers, dead or alive. It is equally probable, if there had been two, or three, or four guards on the car instead of the one man, Cantrell, when the street car stopped at

Thrash Station where the shooting took place, that the strikers would have singled out Weathers and Mills, shot them, and leaped from the street car into the darkness, regardless of the presence of other guards who were the objects of their hostility equally with Weathers and Mills, as to assume or speculate that they would have desisted from their purposes. The presence of more guards could not have prevented the sudden volley that actually came from the back of the car.

The jury were allowed to speculate upon possibilities and probabilities having no basis in the evidence.

> "A servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition, whether the injury was or was not due to the negligence of the master."
> Vol. 4, Labatt, Sec. 1604..

It has been the rule announced for years by all the authorities, that where the testimony leaves the matter uncertain and shows that the injury may have been brought about as a result of some act of negligence, or as a result of some independent cause, and the evidence leaves it uncertain as to what is the proximate cause, then there can be no recovery.

As said by Judge Sanborn in *Midland Valley R. Co. v. Fulghum*, 181 Fed. 91:

> "Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the property or money of one litigant to another. Substantial evidence of the facts which constitute the cause of action is indispensable to the maintenance of the verdict sustaining it."

As the court said in *Patton v. Texas & Pac. R. Co.* 179 U. S. 658, 45 L. Ed. 361:

> "It is not sufficient for an employee to show that an employer could have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion."

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 264.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Petitioner,*

vs.

ODELL MILLS, as Administrator of the Estate of IRA S. MILLS, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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HARSH & HARSH *on Brief.*

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BRIEF FOR RESPONDENT

STATEMENT AS TO THE CASE

Most of the physical facts are fairly stated in the brief for petitioner, but the "statement of the case" therein, and the whole brief ignores the *soul* of this case, which makes the fundamental occurrences in this tragedy so different from the ordinary employee suit it being generally held that the leaving of the premises of the employer breaks the relation between the employer and employe.

Something of this "*soul*" may be realized from a consideration of the following:

Petitioner's employees had gone on a strike and were threatening violence to others who had taken their places and were carrying on petitioner's interstate com-

merce in their stead. If this violence succeeded even in frightening away these new employees, interstate commerce must stop. Violence can be committed even more readily after the workman has left his fellows and is on his way home than it could while upon the premises of employer engaged actively with other employees in employer's work.

The effects of such violence upon interstate commerce inflicted upon a homegoing employee would be just as effective, (not only in preventing that particular employee from continuing his work, but in preventing employer from securing others to take his place) as if that same violence had been inflicted while the employee was upon the premises of employer.

Cases hold that if the employee injured is upon a vehicle used by the employer, in transporting the employee to and from work, although the vehicle is far from the premises of the employer at the time of the injury, yet, the employee is held to be engaged in the work of the employer and if that work be interstate commerce, then, to be engaged in interstate commerce.

It is not the vehicle that is material, nor the ownership of the vehicle, but the fact of the continuing relationship of the employer and employee.

If the fact that it be found convenient by an employer to transport its employees in its own conveyances away from the premises of the employer to the homes of the employees, continues that relationship, then, how much stronger would be the inference that the relationship of employer and employee was still continuing in the present case? Here the employer found that the lives of its employees were being threatened on their way home and that its interstate commerce work was likely

to stop by reason of these threats, unless the employer extended protection to the employees, not only upon the premises of the employer, but conducted them under such protection, to the homes of the several employees, and the employer, realizing such danger of stoppage of its work, did so extend its protection by physically guarding the bodies of its employees all the way to their homes.

This Court, in an opinion by Justice Van DeVanter, in the case of Mondou vs. N. Y., N. H. & H. R. Co., 56 Law Ed. 345, has stated the philosophy of the Federal Employer's Liability Act as follows, viz:

> "The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly, unsafe or otherwise ineffecient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous those particular conditions may and often will prevent or interrupt the act of commerce, or make it less expeditious, less reliable, less economical and less secure. Therefore Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments performed the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness, or economy, or security or utility of the interstate commerce act."

LIBERALITY OF CONGRESS

If Congress could have included the matter in question within purview of the Act, it did so.

Horton vs. Washington, Oregon R. & Nav. Co. 47 LRA (NS) 10

Colasurdo vs. Central R. R. Co., 180 Fed. 83.

PETITIONER'S CONTENTIONS

On page 6 of its brief filed in this court upon the presentation of its petition (which we presume is the only brief to be presented) petitioner sets out its contentions as follows: viz:

1. That Mills was not, at the time of the shooting, employed in interstate commerce;

2. That petitioner rested under no duty to provide Mills with a heavier guard than it did;

3. That it is wholly a matter of speculation and conjecture whether the shooting would have been averted even if a heavier guard had been furnished;

4. That irrespective of any question of negligent failure of the petitioner in that particular, the immediate proximate cause of the death of Mills was the intervening wrongful act of the strikers, for which petitioner was in no way responsible.

We shall take up these contentions separately and we assume that this Court will not consider any other, if indeed any other question could possibly be raised in the case.

BRIEF

I.

It was a jury question, under the evidence, in the trial court, as to whether or not intestate and petitioner were, at the time of the shooting of intestate, engaged in interstate commerce.

St. L-S. F. Ry. Co. vs. Mills, 3 Fed. 2nd Series 882.

Erie R. R. Co., vs. Winfield 61 Law Ed. 1065. (Leaving premises for home but still on premises.)

Chicago & N. W. R. Co., vs. Gray, 59 Law Ed. 1018.

Cudahy Packing Co., vs. Parramore 68 Law Ed. 369-370. (Going to rest house between work on premises.)

North Carolina R. Co., vs. Zachery 58 Law Ed. 596. (Fireman having left interstate engine and going to his boarding house.)

K. C. So. R. Co., vs. Martin 263 Fed. 241.

Ewing vs. Chicago, M. & St. P., 167 N. W. 597.

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L. & N. R. R. Co., vs. Walker, 162 Ky. 209; 172 S. W. 517.

Davis vs. Chicago, R. I. & P. R. Co., 134 Minn., 49; 158 N. W. 911.

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Law vs. Ill. Central 208 Fed. 872.

San Pedro, etc., R. Co., vs. Davide 210 Fed. 872.

Thompson vs. C. & P. S. R. Co., 205 Fed. 20[illegible].

Lamphere vs. Oregon R. & N. Co., 196 Fed. 336.

Baltimore & O. R. Co., vs. Darr 204 Fed. 755.

Wilson vs. Bruner L. Co., 32 So. 460.

1 Roberts Federal Liability of Carriers, Secs. 456 and 457.

The undisputed evidence shows that *petitioner* was engaged in interstate commerce. The undisputed evidence further shows that intestate was employed indiscriminately in interstate and intra-state commerce in the inspection of trains coming into and going out of Birmingham, Alabama, and that his last act before starting home with his guard and his fellow workmen, outside of putting away his tools, etc., on the night of his being shot, was to inspect an interstate train about to leave for Mississippi; that the conditions under which this labor was performed were so dangerous by reason of a strike of former employees of petitioner and their

threats of violence, that, in order to protect its interstate commerce petitioner thought it necessary to use armed guards to protect from physical violence its then employees engaged in this work, not merely while actually at work, but to protect them as instrumentalities in its commerce, when going to and returning from such work to their homes in the City of Birmingham, and petitioner undertook to do so and had been attempting ever since intestate took the place of some striker and subjected himself to the great risk of personal violence, to help petitioner forward its interstate commerce.

If intestate had been deterred from his work or had been hurt or killed while going to or from his home it is a reasonable and almost certain inference that such commerce would have seriously suffered, not only by the cessation of intestate's services therein, but by the consequent frightening of others and thus preventing them from taking the places of the scared off, injured or deceased interstate commerce forwarders.

It thus became as much an essential part of interstate commerce to protect those induced to offer their services to help petitioner out in its extremity in carrying on its commerce, while these helpers in that commerce were on the street or street cars being conducted to their homes through the threatened danger as it was to protect them while actually engaged in striking interstate car wheels to judge of their soundness.

Petitioner seems much concerned about what would happen should this court fail to limit relationships in interstate commerce to the premises of employer. Our answer is that this court has already extended the limit far beyond this to trips to and from home on vehicles conducted by employer.

Petitioner recognized and applied the principle involved by treating as non essential the ownership or management of the vehicle and being in the charge of employee while being conducted by it through the great danger to him as its instrumentality, a sufficient embodiment of the principle involved, but now that death has occurred and a pecuniary claim is made against it, petitioner has changed it mind.

The question as to when the last connection of an interstate commerce employee with interstate commerce has ended for the day, is not so much a question of geography or clock dial reading as it is of the *effect* of the acts and omissions of the employee and employer at the time of the injury upon interstate commerce.

In Lamphere vs. Oregon R. & Nav. Co. 196 Fed. 340 (opinion by Gilbert, Circuit Judge) that Court said:

> "The test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, what is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce?"

We have above quoted to the same general effect from the case of Mondou vs. N. Y. N. H. and H. R. Co. 56 Law Ed. 345.

It makes no difference that the shooting occurred after intestate had ceased for the day or night to swing his lamp or tools under an interstate train. Several of the cases cited in this brief are to this effect.

This court, in the case of Erie R. C. vs. Winfield, 61 Law. Ed. 1065 said, in answering the question, whether the facts in that case sustained the conclusion that the

deceased was employed in interstate commerce at the time of the injury, as follows, viz:

> "The second question must be given an affirmative answer. In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment." (quoting the Zachery case.)
>
> "Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was no more of an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment was extended to interstate commerce is, for the present purposes, of no importance."

In the Zachery case, 59 Law Ed. 596, this court says:

> "Again, it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary or was inconsistent with his duty to his em-

> ployer. It seems to us clear, that the man was still on duty and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

These two cases and many others with equal clearness, demonstrate that to be engaged in interstate commerce the servant may have finished his day's task and be on his way home. It is true that in both of these cases the employee was upon the premises of the employer, but, as we think is demonstrated in the cases above cited, while this fact is usually necessary to continue the relation of employer and employee, it is not the test of the continuance of that relationship, and only usually concludes that relationship because ordinarily the *danger begotten by and connected with the employment* and the undertaking of the employer in reference to the employee ends at the line of the premises of the employer, and therefore the duty of employer toward employee ends, at the geographical line of employer's premises.

However, to demonstrate that this was not the principle involved, but only the usual state of facts to which the principle is applied, we cite the cases where employer assumes to conduct employees to and from their places of work in employer's own vehicles and the holding that thus conducting employees to and from their homes the relationship of employee and employer continues in the same character which it had during the active work of the employee in or about his employer's business.

In San Pedro etc., R. Co., vs. Davide 210 Fed. 872, the circuit court for the ninth circuit said: "It is the well established rule that railroad employees while being carried as a part of their daily service to and from their

place of work are fellow servants." The conclusion is arrived at that if engaged in interstate commerce during the day is so engaged when so being carried homeward.

Petitioner in the case at bar had as much or more immediate and complete charge and control of these employees during the time that petitioner was conducting them by an armed guard to their homes *through the threatened danger* arising out of the employment as when other employers were carrying their employees beyond their own premises upon vehicles belonging to the employers, so far as the threatened danger to petitioner's interstate commerce through injury or death to deceased was concerned. That is the best test.

It might be entirely possible that if a breakdown had occurred in the street car and injury thus caused to the employee, that no negligence could be imputed to the employer, as to that injury. However, no such question is in this case. The personal violence to deceased on his trip home was the result of what the employer and employee knew beforehand was necessary to be guarded against by the employer sending an armed guard in charge of the employee, not merely to the lines of employer's premises, but to *the home of employee and* thus to comparative safety.

In the case of Cudahy Packing Co. vs. Paramore, 68 Law. Ed. 369, this Court, in speaking of the continuance of the relationship of employer and employee (compensation case) said:

> "Whether a given accident is so related or incident to the business must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. The fact that the accident

> happens on a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed, is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of, and in connection with his employment, is subjected peculiarly or to an abnormal degree.
>
> "Upon this question of causal relationship, the English decisions are instructive."

Here the opinion quotes a number of cases, then comments upon facts of the case being decided. The accident in that case occurred at the crossing of a railroad over and on grade with a public street, while the plaintiff was going to his work in an automobile, over which his employer had no control and neither did the employer have any connection with the railroad except that the railroad had spurs into employer's plant, and that the employee, in going to his work, had to cross the railroad upon the public highway where he was injured by a collision with the automobile in which he was riding.

The opinion of this court proceeds as follows:

> "We attach no importance to the fact that the accident happened a few minutes before the time Paramore was to begin work, and was, therefore, to that extent, outside the specified hours of employment. The employment contemplated his entry upon and departure from the premises, as much as it contemplated his working there, and must include a reasonable interval of time for that purpose. * * * * In view of the facts and circumstances peculiar to this case, it was fairly open to the State Supreme Court to conclude that the necessary causal relation between the employment and

the accident sufficiently appeared to save it from the constitutional objection."

REPLY TO ARGUMENT IN PETITIONER'S BRIEF

POINT 1:

Petitioner calls attention to a declaration of LaBatt (Vol. 4 page 4674 to the effect that "the doctrine of the cases holding as set out are referable to the conception that the master retains the right to control the servant, although ordinarily dormant during the period of transportation, is susceptible of being at any moment called to active operation."

At the beginning of Section 1555 page 4669, LaBatt lays down the general doctrine that "a servant who, at the time of the accident in suit, was being transported on a railway car or other vehicle furnished for the purpose of facilitating the performance of his work, is deemed to have been injured in the course of his employment." LaBatt in the same section further says:

> "But most of the illustrations of the doctrine are furnished by the decisions relating to railway servants, who, being engaged in the construction or repair of the permanent way and its appurtenances, or in other duties along the line, were injured while traveling on a train operated by other servants of the defendant. * * * and where it occurred while they were being transported from the place where they resided to the place where they worked."

The subject under discussion was whether or not they were fellow servants with those operating the trains or other conveyances and therefore could not recover.

LaBatt further says, in the same section:

> "The character of the train on which the servant was being transported is immaterial, provided it was being used as a means of conveyance to take him, in the course of the performance of his contract to or from the place where his duties called him."

None of these cases had any reference to the Federal Act and in our judgment none of them are, nor is the "rationale" set out by LaBatt in conflict with the position of the Court of Appeals affirming Judge Grubb, the trial judge in the case at bar.

When peitioner's armed guard went to the home of intestate each morning to escort him through the danger created solely by his employment, and to deliver him to the place where his interstate work car inspections were to be actually performed and when the guard came to the plant of petitioner in the middle of the night to inverse the process and to deliver intestate from the dangers which all parties knew beset him along his path homeward, intestate was, on both these occasions, as much or more within the control of petitioner as if he had been upon petitioner's vehicle. In other words, the character or ownership of the vehicle makes no difference. Petitioner "was taking him in the performance of his contract to or from the place where his duties called him."

Ill. C. R. R. Co. vs. Behrens, 58 Law Ed. 1051.

Petitioner cites and quotes from the Behrens case to the effect "that he was expected, upon the completion of that task, to engage in another, which would have been

a part of interstate commerce, is immaterial under the statute, for by its terms and true test is the nature of the work being done at the time of the injury."

This enunciation of the principle applicable to the case this Court had in hand is not at all inconsistent with the case at bar.

As shown above, this Court holds that interstate character must be at least in part impressed upon the act being done by the employee at the time of his injury, and, if so, it does not then matter whether there is also an impression of intra-state character upon the act, nor is any account taken of the proportion of the two. So that, if the act being done at the time is wholly of *intra-state character*, the servant *is not* engaged in *interstate* commerce.

However, this court has just as strongly and as consistently held that the act being done at the time of the injury *need not* be any act of *actual work* so that it is *sufficiently related*, and, in pursuance of this principle holds that where the day's work is impressed with interstate character, then the leaving of the work at noon for refreshment or rest or when the day's work is done, for the purpose of going home, is still impressed with the character of the day's work, at least so long as the employee is upon the premises of the employer, or upon its vehicle being transported by it from the work to the home.

If LaBatt's "rationale" or if the Behren's case either is inconsistent with this doctrine, then it is in conflict with later cases decided by this court. We see no conflict.

Erie R. Co. vs. Welch, 61 Law Ed. 319.

The yard conductor in this case, having been engaged in *intra*-state commerce exclusively, started to the yard office, but had not, up to the time of his injury, been informed of any orders changing the character of his work.

This enunciation cannot be in conflict with the later cases decided by this Court to the effect that after work is ended and the employee is on his way home upon a vehicle of the employer that his then status is impressed with the character of his day's work, whether that be intra-state or interstate. We think the two entirely consistent.

We must not forget the principle laid down by this Court running through all of its decisions where at all called for, viz: that it makes no difference whether the act being done by the employee is work, or returning from or going to work, but whatever it is, to recover under the act in question it must be impressed with interstate character actually *or by relation*.

Minn. Etc. R. Co. vs. Winters, 61 Law. Ed. 358.

The plaintiff in the above styled cause was a machinist's helper, repairing an engine in the round house which had already completed its interstate work and was "at home."

Justice Holmes said, (page 359):

> "The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a train out of the same place. That

> is all we have, and is not sufficient to bring the case under the Act. This is not like the matter for repairs upon a road permanently devoted to commerce among the states. An engine as such, is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to do anything more definite than such purpose as it might be needed for."

Intestate, in the case at bar, having impressed interstate commerce character upon his day's work, and upon the last act of his day's work, had not been delivered in safety to his home by petitioner's guard, when shot. Interstate character still was upon his act in that petitioner was attempting to deliver its interstate employee to a place of safety through the dangers which petitioner's contract with him had created and until delivered he was still an instrument of interstate commerce.

Sou. Ry. vs. Puckett, 61 Law Ed. 1321.

The petitioner catches at the expression of Justice Pitney quoted by petitioner, but which means nothing more, in our judgment, than any of the other many expressions of this and other courts holding that the actual thing being done at the time must have interstate character whether by direct work therein, or by relation thereto. In fact, the case was decided within three weeks of the Winfield case, 61 Law Ed. 1065, in which this Court said:

> "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment." (citing authorities) . "Like his trip through the yard

> to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intra-state commerce, and so, when he was leaving the yard, at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment was extended to intra-state commerce, is, for present purposes, of no importance."
>
> Sou. Ry. vs. Pitchford, 253 Fed. 736.

In that case plaintiff had entered upon the work of receiving ice from the ice chute and transporting it to an ice box. The circuit court said:

> "This work was too remote from interstate commerce to be regarded a part of it."
>
> "Pritchard, Circuit Judge, dissented."

We are not concerned with the correctness velnon of this decision. Because in the case at bar there was no question of the interstate character of deceased's last acts before submitting himself to petitioner's guard for the journey home. The question is not in the case at bar, whether intestate's work was of an interstate character, but whether during his being taken home he still preserved the character of an instrumentality in interstate commerce and this decision throws no light on that subject.

Those decisions which do immensely illuminate the case at bar are the ones holding that servants on the way home, transported by their employers, if engaged during the day in interstate commerce, are still, by relation, to be considered as still so engaged.

Erie R. Co. vs. Winfield, 61 Law. Ed. 1057.

In attempting to differentiate this case from the case at bar, petitioner says:

> "For there, Winfield was still on the employer's premises, and under all the decisions entitled to the protection of the relationship while leaving the yards because the company owed him a duty to enable him to get beyond its premises without being exposed to the negligence of the other employees."

This seems to us to be utterly at variance with the position and argument of petitioner when attempting to apply against the case at bar the claimed doctrine of cases in which plaintiff was said not to be engaged in interstate commerce because he had actually ceased work in interstate commerce, or was not actually engaged therein at the time.

Petitioner, we presume, now admits that under all the authorities a workman leaving the premises under the circumstances named though *not actually engaged in any work*, has his relationship impressed with the character which it had acquired by reason of work that he had done while on the premises.

Whether admitted or not, we believe this to be the doctrine established by this court, and, if so, it seems to us to conclusively follow that it is applicable to the facts of the case at bar, *because the danger through which intestate was being conducted when he was shot directly sprang from his employment, and was realized and undertaken to be guarded against by petitioner until intestate should be delivered to his home.*

Fletcher vs. B. & O. R. Co. 42 Law. Ed. 411.

In that case petitioner shows in its brief, by quoting from the opinion of the Court, that plaintiff had finished his employment for the day and left the premises of his employer and was moving along the public highway in the city, with the same rights any other citizen would have. Certainly, under those circumstances, the relationship was broken.

There is nothing new in Roberts. The question is, *when the work has* been completed *so that it may be said that there is no longer any relationship to work in interstate commerce*. The Robert's quotation does not touch this question.

Hull vs. Phila. R.R. Co. 64 Law. Ed. 670.

The only question decided in that case was that Hull, the deceased, "remained for all purposes,—certainly for the purposes of the Act—an employee of the Western Maryland Co. only." This company was not the defendant.

He was therefore not an employee at all of the petitioner in that case. Had he been, he would undoubtedly have been an interstate employee.

The remaining cases argued are state cases, except the Shanks case, which we will notice later.

The case of Gray vs. Chic. & N. W. RR Co. 153 Wis. 637, was taken to this Court, and this Court's action reported in 59 Law. Ed. 1018, where the action of the state court was not interfered with *solely upon the ground* that the state statute under which it was brought was as favorable to the railroad company as the Federal Act and therefore there was nothing of which the railroad company could complain. This Court seems to

us to intimate that the conclusion of the state court might otherwise have been held to be wrong though the point was not decided.

Shanks vs. Del. L. & W. Co. 60 Law. Ed. 436.

In this case plaintiff was employed in defendant's machine shop and engaged in repairing parts of locomotives used both in interstate and intra-state transportation and was *at the time of his injury* engaged in taking down and putting into a new location in such shop a countershaft.

This was merely putting in condition local machinery, without regard to its future use and has always been held by this Court not to constitute interstate commerce employment.

We do not think there is even an expression in the whole opinion which militates at all against the position taken by the Circuit Court of Appeals in the case at bar.

II.

Petitioner had uniformly furnished the guard in its attempt to conduct and protect its employees to and from their homes.

The present argument does not relate to the question of interstate commerce specially, as that has already been argued both by petitioner and respondent. It does relate to the question of duty as it affects negligence vel non.

Petitioner found itself in the midst of a nationwide strike and unable to carry on its business without procuring strike breakers. Not only does the evidence specifically show various threats by the strikers against

these strike breakers, but as petitioner states in its brief, it was common knowledge that there was widespread violence and bloodshed all over the country growing out of this strike.

It is possible that had petitioner merely offered to pay its strike breaking employees their wages, without more, that no duty would have been begotten to extend protection. However, under the facts shown in the case at bar petitioner did not stop there, but, at least impliedly, promised deceased protection against the violence of strikers and in pursuance of that promise undertook to conduct them under armed guard to their homes.

Such an implied promise and undertaking begets the duty to at least use reasonable care, skill and diligence in furnishing such protection, and what is such reasonable care, skill and diligence is generally a matter for the jury; that is, for the common sense, common experience and common judgment of mankind in the jury box. It is not a matter for expert testimony. Had it been it would still be for the jury, advised by such testimony.

In the case at bar, as petitioner's attention had been called to specific threats and to the inefficiency of the guard that had been furnished, it would be ignoring an allowable, if not practically necessary, inference, that petitioner should have furnished a more effiecient guard, had the court taken that question from the jury.

Petitioner says in its brief that the testimony does not show that any promise was made. True, there is no express promise set out in the evidence but the circumstances set out certainly furnish the basis for an inference of such promise, which might be drawn by the jury.

The record shows that when intestate entered petitioner's service and from that time on up to his death, petitioner had been furnishing such guard, and the common knowledge referred to by petitioner shows that an efficient guard was necessary. The warnings also show the necessity for efficient guarding and it is hardly likely that intestate would not have implied from these circumstances a promise by petitioner that he would be guarded, and no less likely that petitioner understood intestate would imply such promise.

Petitioner implies in its brief that a praetorian guard for each employee would have been necessary. The number of strikers were comparatively small in each yard, as only a very limited class of employees were on strike. Petitioner says (page 25 brief) that "yet it is a matter of common knowledge that in this particular strike, as in many others, the utmost care, consistent with any reasonable outlay for protection, failed in numberless instances to avert violence and bloodshed."

If this were true, yet that would not excuse the failure to furnish but one guard for two employees and that one guard reported to petitioner to have shown the white feather and to have refused to accompany employees where their duty called them because of the presence there of strikers.

In no case is it possible to see with certainty what would be the result in future of any given action or inaction but under the circumstances as known to petitioner beforehand, it would seem to the average man that the least that could have been done by petitioner for the men who were risking their lives in its service would have been to attempt to adequately guard them.

James C. Davis, Director Gen. vs. Green, 67 Law, Ed. 300 and: Roebuck vs. A. T. Etc. R. Co. 99 Kansas 544.

These cases merely decide that under the United States law a master is not liable for a wanton and willful act of an employee done to satisfy his own spite and not in furtherance of his master's business. Both suits were based on this kind of wrong of an employee.

In the case at bar the suit is based on the negligence of omission by reason of which deceased was killed while related to interstate commerce, and petitioner is not sought to be held liable, (respondeat superior) for any willful act of any servant or of anybody else.

The wilfulness of a third person was the known danger into which petitioner negligently led intestate to his death by not furnishing adequate protection when the duty arose so to do.

In the Roebuck case the chief justice and Justice West dissented.

COMPENSATION CASES

Petitioner cites four compensation cases which it claims hold that injury by the violence of a striker was not received in the course of the employment of the injured employee and that therefore he was not entitled to compensation.

It is to be observed that these are state cases and that it is entirely possible that neither the state legislatures in enacting the laws nor the state courts in interpreting them, had the same liberal intent toward employees as did Congress and this Court.

Then too, we find in the cases themselves, either stated or hinted at, the distinction on which the Court of

Appeals acted in the case at bar and which is commented on in many cases.

For instance, in Redner vs. H. C. Faber & Sons (N. Y.) quoted from on page 27 of Petitioner's brief, it is said:

> "Also compensation has been allowed while the employee was traveling to and from his work in a conveyance furnished by the employ under the contract of employment and the necessities of the situation."

This being true, Mills was acting just as much in the *course of his employment*, when under his implied contract of employment and the necessities of the situation, he was being guarded to his home by petitioner after his day's work in interstate commerce.

III AND IV

The two propositions argued by petitioner under the above numbers respectively are but two denials that the death of Mills was the proximate result of the negligence alleged.

Petitioner strongly criticises the opinion of the two learned Circuit Judges who sat in the Circuit Court of Appeals and the "judgment" of the trial court (Hon. W. I. Grubb) and says that what they did was "to transmute a mere inactive condition into an active causative force, responsible for the killing."

It seems to us that the judges understood the situation much better than petitioner now seems to.

There was a storm of threats and hate raging between employer's plant and employee's home. Employee presumably would not agree to go to and fro between his home and employer's plant until employer had

impliedly agreed to conduct him under adequate protection against the storm, and had pretended to do so by furnishing some but inadequate protection. The storm blew the life out of employee, though it blew no worse than a reasonable man would have anticipated.

What was the proximate cause of employee's death, the raging storm, known to employer and the violence of which could have been reasonably anticipated, *or* the conducting of employee out in it without adequate protection? The violence of the strikers was not an *independent intervening cause*. It was the known *condition to be avoided* by adequate protection. It was the *anticipated violence* which begot the duty to exercise care. It did not *intervene*. It *originated* the necessity for care. But for the actual or implied threats of the strikers to commit violence, there would have been no reason for, nor duty to, exercise care.

The duty of employer to exercise care while conducting employee homeward under armed guard to prevent harmful consequences to employee of a *dangerous condition arising solely out of the employment* and known to employer cannot be answered by saying "yes, the very thing happened which it was our duty to try to prevent, and we did not try sufficiently and the thing happened, *but* that thing was the independent act of a lawless human being." The known threatenings of lawless human beings can make conditions of work just as dangerous as defective machinery.

It would be equally illogical to allow negligent employer to escape on the theory that it could not be certain just how much, if any, amount of guarding would have saved the life of employee and to call any judgment exercised by the jury and approved by the trial judge in the premises *mere speculation*.

Anything in the future is uncertain. It is common knowledge that guards tend to ward off violence and men generally including kings, presidents and great men act on this knowledge. Petitioner acted on it. However, though petitioner had direct notice that the one guard it supplied was insufficient and the evidence shows it had others, it answered employee's complaints by saying that the threats were a bluff, and the death followed.

The following are cases in point on the principle, in addition to the cases cited in the opinion of the Court of Appeals.

So. Ry. vs. Bush, 122 Ala. 487.
Bham Ry. & E. Co. vs. Smith, 121 Ala. 352.
L, & N. R. Co. vs. Miller, 65 So. 169.
Danson vs. A. G. S. R. Co., 65 So. 487.
Doyle vs Boston, Etc. Ry. Co., 145 Mass. 485.
Filson vs. Pacific Express Co., 84 Ken. 614; 114 Pac. 863.
Cudahy Packing Co. vs. Paramore, 68 Law. Ed. Bottom page 369 & p. 370.
Munsey vs. Webb, 58 Law Ed. 165-6.
Green vs. Atlantic C. L. R. 38 A. L. R. 1453.

In the Green case on the page above cited, after stating the general rule, said:

> "But, where it appears that the master has actual knowledge of conditions within his control which conduces to expose a servant in the performance of the master's work to danger from the lawless acts of third persons and that

> the intervention of such illegal acts of third persons is a consequence reasonably to be expected from the maintenance of such conditions, a different case is presented."

In the case of Oklahoma & Gulf R Co. of Texas vs. W. J. Pike, 264 S. W. 593, the Court of Civil Appeals of Texas says in part as follows:

> "This is an appeal by appellant Railway company from a judgment of the District Court of Grayson County in favor of appellee in an action for damages for the breach of an express agreement entered into by appellant to protect appellee from assault and injuries by strikers and strike sympathizers. On July 1st, 1922, there occurred a nationwide strike of shop craft employees of railway companies, including those of appellant at Dennison, Texas. Appellee, in this situation, entered the service of appellant on July 12, 1922, and while engaged in performing the duties of his employment was shot by a striker or strike sympathizer, and wounded substantially, as alleged in his petition."

The court could not find anything illegal, or unrecoverable in that cause of action.

> See also Hansen vs. Dodwell, etc. L. R. A. 1918 C. 925.

Petitioner says that more guards would not have done any good. How does it know? The jury had the right to consider human nature and their general common knowledge and common sense. The trial judge did not agree with them nor did any member of the Court of Appeals. The sole dissenter put his action on the ground

that employee was not engaged in interstate commerce when shot.

It is true that the trial judge in this cause held that there was no evidence that the particular guard was himself guilty of any negligence on the occasion of the shooting. But the Court did not say that his being alone was not negligence. Cantrell, the guard furnished was a demonstrated coward and defendant had had this fact reported to it. It seemed that the strikers knew of his cowardice and laughed when the butt end of his gun was exposed while they were in the street car with him. His presence, being a coward, was not preventive defense.

However, that may be, the learned trial judge was of the opinion that it was for the jury to say under all the circumstances whether or not there was negligence which proximately contributed to the death in not sending sufficient guards. The Court did not say that the jury should not have weighed, in determing this question, the fact that Cantrell was an unfit person to be sent as a guard. He was certainly insufficient in and of himself. He needed assistance. Two guards are better protection than one.

The jury in any case may draw any reasonable inference which is justified by the evidence, weighed in the balance of common sense, common knowledge and common experience.

All these scales tell us that men who have violence against others at heart without personal animosity will not endanger their own lives any more than possible and will not, therefore, attack people who are properly protected and guarded.

Whether or not any lack of care would probably have prevented injury is hardly demonstratable in any case. It must practically always be left to inference.

There is no doubt in the evidence that the strikers shot Mills to death, possibly intending to get Weathers, the older man in what they considered crime against their jobs. Weathers was the man they had threatened on two or three occasions.

Defendant's lawyers take advantage of this fact to argue in the Circuit Court of Appeals, that, because Weathers was the man threatened that no action would lie for the killing of Mills, or that the jury would have any right to infer that the death of Mills proximately resulted in his not being sufficiently guarded. The position seems to us so ill founded as to scarcely need attention at all. Mills and Weathers were what is known as "buddies"; that is they were joint inspectors. They went together all the time on their work and they were being taken home together under guard of the company—men employed for that purpose.

Danger to one was danger to the other, and Mills was a strike breaker also.

We do believe, that it would be hard to find a human intellect or a human heart (not interested adversely) which would approve of the attitude of the defendant in this case and its effort to show that the very purpose for which it hired plaintiff's intestate into danger, being to prevent delay and interruption of its interstate commerce, had no real relation to interstate commerce, and that if it did have such relation while the injured person was actually on the premises, employer could legally turn them loose to the tender mercies of the strikers as soon as they got out of the yards where they were com-

paratively safe half-guarded, notwithstanding at the time of the hiring and up to the time of the death the company actively conducted itself on the idea that employees must be conducted under guard to their homes.

Our claim is that the company did in principle exactly what it should have done up to the death, except that it did it inefficiently and negligently.

Respectfully submitted,

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Birmingham, Ala.

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Attorney for Respondent

SUPREME COURT OF THE UNITED STATES.

No. 264.—October Term, 1925.

St. Louis-San Francisco Railway Company, Petitioner, *vs.* Odell Mills, as Administratrix of the Estate of Ira S. Mills, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 24, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent's intestate was employed in interstate and intrastate commerce by the petitioner, as a car inspector in its yards in Birmingham, Alabama. During the railroad shopmen's strike, on the night of August 3, 1922, decedent, while returning from work to his home, on a street car, was shot to death by strikers who fired upon him, a fellow workman, and a deputy sheriff employed by petitioner to guard decedent and his companion. Respondent brought suit in the Circuit Court of Jefferson County, Alabama, to recover for intestate's death, under the Federal Employer's Liability Act, c. 149, 35 Stat. 65. The cause was removed to the District Court for northern Alabama on the ground of diversity of citizenship. Judgment for the plaintiff, the respondent here, was affirmed by the Circuit Court of Appeals for the Fifth Circuit. 3 F. (2d) 882. This court granted certiorari, 269 U. S. —.

The trial judge withdrew from the jury the question whether the guard was negligent in the performance of his duty, but left it to them to say whether upon the evidence, defendant was employed in interstate commerce at the time and place of the shooting; whether there was a duty of due care on the part of the defendant to protect decedent from violence by strikers while going from his place of employment to his home; and whether the failure of respondent to send more than a single guard to protect decedent was negligence causing his death. The instructions so given, and

the refusal to direct a verdict for the defendant, are assigned as error.

Petitioner argues that the evidence did not warrant the submission of any of these questions to the jury; and contends, among other objections, that there is no evidence of a breach of any duty owing by petitioner to respondent. The question of law thus raised goes directly to the right to recover under the Act upon which the action was based. See *St. Louis & Iron M. Ry.* v. *McWhirter*, 229 U. S. 265, 277

It is not contended that any duty growing out of the relationship of employer and employee required the employer to guard the employee against violence by strikers. Compare *Davis* v. *Green*, 260 U. S. 349, 351; *Manwell* v. *Durst*, 178 Cal. 572; *Roebuck* v. *Railway Co.*, 99 Kan. 544; *Louis* v. *Taylor Coal Co.*, 112 Ky. 485; *Rourke's Case*, 237 Mass. 360; *Matter of Lampert* v. *Siemons*, 235 N. Y. 311. Nor is there any evidence of such an undertaking in the contract of employment. Hence the duty, if it existed, must be predicated upon the voluntary assumption of it by petitioner.

Taken in the aspect most favorable to respondent, the evidence shows that decedent was first employed on the Monday preceding his death, which occurred on Thursday. The strike had been in progress for some time, and six or seven employees were on strike in the yard where decedent was employed. The number of strikers elsewhere does not appear. Seven guards were employed by petitioner in the yard where decedent worked, and from fifty to seventy-five were employed elsewhere in the city. There was some evidence that during decedent's employment, guards had been provided for employees while at work during the day, and to accompany decedent and some others to and from their homes. There was no evidence that petitioner had ever furnished decedent or any other employee with more than one guard in going to or from work; or any other evidence from which it could be inferred that petitioner had undertaken, or held itself out as undertaking, to furnish more protection to the decedent or its other workmen than it actually did furnish.

The respondent here asserts that the defendant, having assumed to do something, should have done more. But the bare fact that the employer voluntarily provided some protection against an appre-

hended danger, by undertaking to do something which involved no special knowledge or skill, can give rise to no inference that it undertook to do more. Respondent therefore relies on the breach of a duty which does not exist at common law, and of whose genesis in fact it offers no evidence.

There is a similar absence of evidence of negligent failure by petitioners to fulfill this supposed duty of protection. The burden of proving negligence rested on the respondent. *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658. But whether a supply of guards sufficient to meet the emergency was obtainable; what demands were made upon them, and whether there were other guards available for the particular journey when the decedent was killed, are questions on which the record is silent.

Nor is there evidence from which the jury might infer that petitioner's failure to provide an additional guard or guards, was the proximate cause of decedent's death. Whether one or more additional guards would have prevented the killing is in the highest degree speculative. The undisputed evidence is that the shooting was done by one or more of three men standing on the rear platform of the car. They had come there after decedent and his companions had seated themselves in the car. Without warning they fired a volley into the car, and fled. Decedent and his guard were armed, but had no opportunity to defend themselves. On such a state of facts the jury should not have been permitted to conjecture what might have happened if an additional guard had been present. See *Patton* v. *Texas & Pacific Ry., supra; Reading Co.* v. *Boyer,* 6 F. (2d) 185; *Midland Valley R. R.* v. *Fulgham,* 181 Fed. 91; *Laidlaw* v. *Sage,* 158 N. Y. 73. The evidence must at least point to the essential fact which the jury is required to find in order to sustain the verdict.

We need not inquire whether decedent was employed in interstate commerce at the time of his death, or whether the rule laid down in *Erie R. R.* v. *Winfield,* 244 U. S. 170, can be extended, as the court below held, so as to support the judgment of the District Court.

Judgment of the Circuit Court of Appeals is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.